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49 CFR Part 622

Environmental Impact and Related Procedures; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Urban Mass Transportation Administration

23 CFR Parts 635, 640, 650, 712, 771, and 790

49 CFR Part 622

[FHWA Docket Nos. 85-12 and 83-20]

Environmental Impact and Related Procedures

AGENCIES: Federal Highway Administration (FHWA) and Urban Mass Transportation Administration (UMTA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FHWA and the UMTA are issuing a joint final regulation governing the preparation of environmental impact statements (EISs) and related documents under grant programs administered by FHWA and UMTA. The amendments contained in this final rule will streamline the project-development process and provide increased decisionmaking authority to agency field offices. The amendments are consistent with the directives of the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations, and other Federal statutes and incorporate the requirements of DOT Order 5610.1C, "Procedures for Considering Environmental Impacts." The documents and actions to which this regulation applies are described more fully in § 771.109 of the regulation. By this final rule, the FHWA is also eliminating duplication in its public involvement regulations by rescinding 23 Code of Federal Regulations (CFR) Part 790 and amending a section of 23 CFR Part 771 to make it the agency's single public involvement regulation. This action will contribute to the establishment of a streamlined, one-stop environmental process in which public involvement is fully integrated with the other project development and environmental procedures.

EFFECTIVE DATES: The amendments to 23 CFR Parts 640, 712 (see the amendatory instruction number 4), and 771 are effective on November 27, 1987. The amendment to Subpart A of Part 622 of 49 CFR is effective on November 27, 1987. The amendments to 23 CFR Parts 635, 650, 712 (see the amendatory instruction number 8), and 790 are effective August 29, 1988, in order to allow States which conduct public hearings under Part 790 to adopt public involvement/public hearing procedures that satisfy the requirements of Part 771.

ADDRESSES: Copies of comments received, together with the regulatory evaluation required by DOT policies and procedures, are available for public inspection in the public docket room of FHWA, Room 4205, HCC-10, 400 Seventh Street SW., Washington, DC 20590, between the hours of 8:30 a.m. and 3:30 p.m. EST, Monday through Friday. These materials are filed under FHWA Docket Nos. 83-20 and 85-12.

FOR FURTHER INFORMATION CONTACT: (1) For FHWA: Mr. Frederick Skaer, Office of Environmental Policy (HEV-10), (202) 366-0106, or Mr. Edward Kussy, Office of the Chief Counsel (HCC-40), (202) 366-0791, FHWA, 400 Seventh Street SW., Washington, DC 20590, between the hours of 7:45 a.m. and 4:15 p.m., EST, Monday through Friday; (2) For UMTA: Mr. A. Joseph Ossi, Office of Planning Assistance (UGM-22), (202) 366-0096, or Mr. Scott A. Biehl, Office of the Chief Counsel (UCC-5), (202) 366-4063, UMTA, 400 Seventh Street SW., Washington, DC 20590, between the hours of 8:30 a.m. and 5:00 p.m., EST, Monday through Friday.

SUPPLEMENTARY INFORMATION: The regulation being issued today applies to both FHWA and UMTA actions. Thus, it will amend Part 771 of Title 23 of the CFR with a cross reference at Part 622 of Title 49 of the CFR.

Introduction

This final rule amends the regulations utilized by FHWA and UMTA to comply with the CEQ's regulations and other environmental requirements. The FHWA and the UMTA first published regulations implementing CEQ requirements in 1980. (See 45 FR 71968; October 30, 1980.) On August 1, 1983, FHWA and UMTA published changes to their joint environmental regulation (48 FR 34894) as a part of the departmental effort to streamline regulations and reduce red tape. In response to that Notice of Proposed Rulemaking (NPRM), Docket 83-20, 51 comments were received from various Federal, State, and local agencies. Twenty-six of these comments were from State highway agencies (SHAs) or State DOTs. Eleven comments were received from transit or planning agencies. Seven comments were received from interested cities or counties. Two comments were received from State Historic Preservation Officers (SHPOs). The National Trust for Historic Preservation provided comments as did the following Federal agencies: The Environmental Protection Agency, the Department of the Interior, the Advisory Council on Historic Preservation, and the U.S. Coast Guard. On January 31, 1985, the FHWA published another NPRM to rescind 23 CFR 790 and to amend 23 CFR 771.111(h). (See 50 FR 4526, Docket No. 85-12). This final notice combines both rulemakings. Comments on Docket No. 85-12 are discussed below as the last item under the heading "Section-by-Section Analysis."

General Comments

The majority of comments received in Docket No. 83-20 were generally supportive of the streamling proposals made in the NPRM. This is especially true of the greater flexibility built into the categorical exclusion (CE) process. Many of the comments requested more flexibility, but, as will be discussed below, we were unable to make major changes given current statutory constraints. Another major source of comments was a proposal in the NPRM to require written reevaluations before each major project step. Substantial changes to that proposal have been made here. These are addressed in greater detail below.

It should be noted that most sections of the regulation have been renumbered from the NPRM, although the section headings have been retained. Section 771.127 of the NPRM has been subdivided into two sections (771.129, Reevaluations, and 771.130, Supplemental Environmental Impact Statements).

As with the 1980 regulation, this regulation has been approved by the Office of the Secretary of Transportation as being consistent with DOT Order 5610.1C. Applicants and Administration field offices should not normally need to consult DOT Order 5610.1C.

There were a number of editorial changes made throughout the document to make it more readable. Only the major changes made to each section of the regulation are discussed in this preamble.

Section-by-Section Analysis

Section 771.101. Purpose. This section has been amended to include a reference to 23 U.S.C. 128. Section 128 contains the FHWA public hearing requirements and describes the environmental report needed as a part of the public hearing requirements.

Section 771.105. Policy. This section sets forth basic Administration policy regarding the consideration of environmental impacts of Administration actions. Sections 109 and 128 of Title 23 and sections 3, 5, and

14 of the Urban Mass Transportation Act (UMT Act), 49 U.S.C. 1602, 1604, and 1610 require both FHWA and UMTA to consider social, economic, and environmental impacts of proposed projects. The documentation developed pursuant to this regulation is intended to satisfy both NEPA and the above sections.

It is the policy of FHWA and UMTA to make the process set forth in the regulation the primary vehicle for all environmental approvals of Administration actions by all Federal agencies. This can only be accomplished if both applicants and Federal agencies are committed to the development of procedures and cooperative arrangements which take advantage of the opportunities presented here to create as complete an environmental record as possible.

Administration policy on the funding of efforts to mitigate the impacts of Administration actions remains the same. The intent is that Federal funds be available to assist in complying with Federal requirements, as well as State and local requirements which do not conflict with Federal requirements. However, in those situations where State or local requirements differ from Federal requirements, the decision to use Federal funds will be made on a case-by-case basic, after considering the reasonableness of the applicant's request and the costs and benefits of Federal participation in the request.

Several commenters questioned the "status" of FHWA's Technical Advisory T6640.8 and requested clarification. The Technical Advisory was developed by FHWA for the purpose of providing the best available guidance to its field offices and applicants regarding the types of information needed to comply with NEPA, section 4(f) of the DOT Act of 1966, and other environmental requirements, such as Executive Order 11990, "Protection of Wetlands." The Technical Advisory is available for inspection and copying as prescribed in 49 CFR Part 7, Appendix D. The FHWA expects the Technical Advisory to be used to the fullest extent possible. However, FHWA also recognizes that each project must be evaluated on its individual issues and merits. When circumstances dictate, there is sufficient flexibility to tailor the content of the environmental document to the needs of the individual situation. A revised Technical Advisory has been prepared and will be issued as T6640.8A on October 30, 1987.

The UMTA also has developed supplementary guidance on the NEPA process for applicants. UMTA Circular C5620.1, "Guidelines for the Environmental Protection Process", provides information on the assessment of environmental impacts for major transit projects, and the preparation and processing of environmental documents. This circular is available from UMTA Headquarters and field offices.

Section 771.107. Definitions. In the 1980 regulation, the term "action" was defined as the Federal approval of construction of highway and transit projects. The CEQ regulations use the term "proposed action" in a broader context. There, actions include projects and programs that are proposed for Federal assistance as well as proposed plans, policies, and legislation. For consistency with the CEQ regulations, a new definition for "action" has been added. As used throughout the regulation, actions are highway or transit projects proposed for Federal funding or activities such as joint and multiple use permits which require Federal approvals. The actual Federal approval of the construction of a highway or transit project or of a permit is now covered in the new definition of "Administration action." The difference between an "action" and an "Administration action" as defined under the regulation is the difference between a proposed project and an actual Federal commitment to fund construction of the project.

The DOT Act of 1966 included specific provisions providing special protection to publicly owned parks, recreational areas, wildlife and waterfowl refuges, and all historic sites. This provision was set forth at section 4(f) of the DOT Act, and printed in the United States Code (U.S.C.) at 49 U.S.C. 1653(f). A similar provision is found at 23 U.S.C. 138. In 1983, as part of a general codification of the DOT Act, 49 U.S.C., 1653(f), was formally repealed and recodified with slightly different language in 49 U.S.C. 303. However, the substantive requirements remain unchanged. Given that over the years, the whole body of provisions, policies, case law, etc., has been collectively referenced as "section 4(f)" matters, we have continued this reference in this regulation, even though section 4(f) of the 1966 DOT Act has been technically amended. To change the popular reference to "section 4(f)" would confuse needlessly the public and the Federal, State, and local agencies that participate in "section 4(f)" matters on a recurring basis.

The only other changes to this section were minor editorial changes to make it more readable.

Section 771.109. Applicability and responsibilities. This section deals with the documents and actions to which this regulation applies, the status of prior approvals, and the responsibilities of both the Administration and grant applicants for the preparation of the documents required by this regulation.

Paragraph (b) deals with the responsibility for carrying out mitigation measures that have been described in the Administration's environmental documents. One commenter suggested that language be added to the regulation to specify that the Administration monitor projects during and after construction to ensure that mitigation measures that have been described in the Administration's environmental documents are implemented. The Administration meets its responsibility set forth in paragraph 1505.2(c) of the CEQ regulations (40 CFR Parts 1500–1508), and the regulation has been modified to make this clear. Paragraph (b) now states that mitigation measures will be incorporated by reference in the grant document and UMTA will follow up with reviews of designs and on-site inspections to ensure that mitigation measures are implemented as called for in environmental documents and grant agreements. It should be noted that the mitigation measures referenced in an executed grant agreement become contractual obligations on the part of the applicant and cannot be changed without the express written approval of UMTA. FHWA assures that mitigation measures are implemented by reviewing and approving the plans and specifications for the project and by conducting periodic construction inspections. On projects processed under an approved certification in accordance with 23 CFR 640, FHWA ensures the implementation of mitigation measures by conducting program management reviews and a final construction inspection.

In paragraph (c), different levels of responsibility for applicants preparing EISs are defined depending on whether section 102(2)(D) of NEPA or a State law comparable to NEPA applies. Several local transit agencies asked what role they would assume if a State requirement comparable to NEPA applies. In such cases, the transit agencies will have a joint lead responsibility with UMTA and will take a substantial role in preparing the environmental document. It is intended that a single document satisfy all Federal and State requirements.

Section 771.111. Early coordination, public involvement and project development. The FHWA and the UMTA regard early coordination and public involvement as critical to the successful completion of the processes required by this regulation. Scoping, a

major innovation of the CEQ regulations, is accomplished in this phase. Many potential difficulties confronting particular actions can be most conveniently identified and, in many instances, resolved at this stage.

Public involvement as discussed in this regulation, may mean not only public hearings, but a series of less formal informational meetings which begin after the planning phase and help affected persons and local governments learn about agency actions and identify potential difficulties at the earliest possible time. Very often, the persons most affected are those who must be relocated from their homes or businesses by the agency action. Appropriate relocation planning and studies should be done as part of initial project planning, usually during the course of preparing documents required by this regulation, to ensure that the rights and concerns of potentially affected residents and businesses are fully addressed and considered in the development and timing of agency actions. Very often, project location, design, and right-of-way problems are particularly sensitive where certain ethnic, social, or economic groups are affected to unusual or disproportionate degrees. Where this might be the case, these issues should be considered very early in the process. Notification of any project related hearings, meetings, or opportunities for public involvement should be placed in newspapers or publications most likely to be read by affected groups. This would include minority or foreign language newspapers where appropriate.

One commenter asked that paragraph (b) be dropped. This paragraph identifies an early point in project development, the Transportation Improvement Program (TIP) review, where the Administration will consult with an applicant on environmental requirements. This was done in response to paragraph 1505.1(b) of the CEQ regulations which requires Federal agencies to designate major decision points in their programs and ensure that the NEPA process corresponds with them. The TIP is a local planning document identifying projects to be implemented over a 3–5 year time frame. Not all listed projects are subsequently constructed, but inclusion in the TIP is an early indication that Federal funding may be pursued. It is expected that applicants will initiate environmental impact work first on the high-priority projects in the TIP. When adequate site-specific information is available at the TIP review stage, FHWA and UMTA will determine whether an EIS, EA, or CE is appropriate and whether other environmental requirements apply. The 3–5 year time frame of the TIP will allow ample lead time for document preparation, public involvement, and agency review. This provision has been retained because it supports early consultation in the environmental review process without placing unnecessary burden on prospective applicants. However, this paragraph was modified to indicate that FHWA would, where appropriate, indicate the possible class of action at the later, formal 105 program approval stage. This technical change was necessary since FHWA reviews, but does not approve, the TIP.

Paragraph (d) adopts the suggestion to change the word "should" to "must" in the second sentence.

Paragraph (g) describes the tiering of EISs as an optional approach which may have benefits when considering large, complex transportation projects. This paragraph stimulated a mix of comments. Several commenters expressed the concern that two sets of EISs do not lead to improved decisionmaking regarding major projects and are not justified considering the additional cost and time involved. Others supported the tiering concept and noted that it had been used successfully when incorporated with early planning at the local level. Tiering of EISs may be beneficial under certain limited circumstances, but a tiered approach can only be effective if the initial EIS is prepared very early in the planning process. The focus would be on a broad comparison of key environmental factors which may have a bearing on early decisions concerning, for example, the type of project, the general location, and major design features. This approach is consistent with the CEQ regulations which encourage agencies to consider environmental effects at an early stage before decisions on major alternatives are foreclosed. A second-tier EIS (or EA where no new significant impacts are expected) would be appropriate at the stage where a preferred alternative has been identified and project details have been developed.

Commenters asked for clarification as to how the Administration determines the need for tiered EISs. The decision to use tiering will be made in consultation with the applicant and will depend on the scope and complexity of the alternatives under consideration, the status of planning, and the need to address environmental considerations at an early stage in the local planning process. Generally, the Administration would not direct an applicant to prepare tiered EISs but, instead, would employ tiering to accommodate an applicant's planning or environmental review requirements.

It should be noted that this progressively, more focused look at a project embodied in the concept of tiering may also be accomplished with a supplemental draft EIS. If project details are developed before a final EIS has been issued (e.g., during preliminary engineering), site-specific environmental effects can be addressed in a supplemental draft EIS. In this case, the process would be concluded with a final EIS responding to comments on both the general and the site-specific draft EISs. Thus, the process of tiering EISs is most appropriate where a project concept is still in the formative stages and the applicant is actively seeking information from agencies and the public in helping to reach early decisions. Tiering is accomplished with two complete EISs; however, alternatives and environmental concerns fully considered in the first-tier statement need not be restudied in the second-tier EIS.

Paragraph (h), which discusses the FHWA public hearing requirements, has been addressed in a separate NPRM (50 FR 4525, January 31, 1985). A discussion of final revisions as well as comments submitted to the public docket appears later in this document as the last item in the section-by-section discussion.

A new paragraph (i) has been added discussing public involvement for UMTA's projects. No new requirements have been established; however, coordination of any public hearings with NEPA process is emphasized with special reference to the preparation of EAs and environmental studies. It should be noted that although these hearings and the FHWA hearings are coordinated with the NEPA process, they are not required by NEPA itself; the requirement for public hearings is found in FHWA and UMTA legislation. Under these statutes, questions such as the need to hold hearings during the preparation of a NEPA document and the type and scope of those hearings are within the Federal agency's discretion.

This new paragraph also refers to the scoping process as a means of inviting public and agency comments on a project proposal. Providing this opportunity for input at an early stage frequently helps the applicant and UMTA to focus on important environmental effects and to determine whether reasonable alternatives exist to avoid or mitigate those effects. For example, in regard to sections 9 and 9A of the UMT Act, UMTA intends that the

new paragraph (i) will generally apply to the program of projects proposed for Federal funding. If practicable, EAs should be prepared, where required by this regulation, before the notice of an opportunity for a public hearing on the program of projects. At a minimum, the notice announcing the opportunity for a hearing should indicate those projects requiring EAs, the timetable for preparing those documents, and how copies may be obtained. If, after releasing the EA, UMTA or the applicant becomes aware of strong community concerns or controversy on environmental grounds, or if UMTA determines that an EIS is necessary, the applicant will hold a separate hearing on the project to receive public comment. The UMTA will continue to require early contacts with affected agencies and the public in defining the scope of environmental documents.

Section 771.113. Timing of Administration Activities. This section describes the timing of various project development activities in relation to the completion of the environmental process. It places limits on the actions which the Administration and the applicant may take to develop a project prior to the completion of the NEPA process.

The language in paragraph (a) supports, and should be read in conjunction with, section 1506.1 of the CEQ regulations, "Limitations on actions during NEPA Process." These provisions ensure that the Administration's decision whether to implement an alternative under consideration in the environmental document will not be influenced by a previous commitment to a particular course of action. As such, the strictures apply not only to the Administration and applicants, but also third parties acting under a contractual agreement. Furthermore, the Administration or the applicant cannot prematurely enter into a contract which irrevocably binds it to the future performance of this work. This limitation on actions supports one of the primary purposes of NEPA—that Federal agencies consider environmental effects fully, including alternative courses of action, before reaching a decision to proceed with major Federal actions.

The wording in this paragraph has been revised to make clear the kinds of activities that will be allowed prior to the completion of the NEPA process. This will include any impact studies and engineering work needed to complete the environmental document. Normally, preliminary design will provide all the project information needed to satisfy environmental requirements. In certain cases, more detailed design work will be needed to satisfy a specific environmental requirement and this additional design work is allowed. This paragraph has also been changed to expand on the kinds of activities which may not occur prior to completion of the NEPA process.

It is important to note that the limitations on premature commitments in the CEQ regulations and this regulation apply to projects or activities that may be proposed entirely for local funding by an applicant or prospective applicant. If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and funded separately before the environmental process is completed. Segmentation of a project might involve the early acquisition of property or the purchasing of rolling stock, construction materials, or other equipment needed during the construction phase. Segmentation could also entail separate development by the applicant of an entire portion of a project, e.g., a segment of highway or transit guideway that should be considered as part of a larger project for which Federal assistance is being sought.

A number of commenters suggested revisions to this section to permit the applicant to proceed with final design activities after the receipt and evaluation of comments on the draft EIS and prior to approval of the final EIS. The commenters contended that the EIS approval process delayed the start of final design work and, therefore, induced delays in all subsequent phases of the project development process. They suggested that if no environmental concern were raised during the draft EIS circulation period, final design of the preferred alternative should be allowed to proceed. The Administration has carefully considered these comments and continues to believe the environmental process must be completed and the EIS approval made before it is in a position to permit the applicant to proceed with final design activities. We recognize the need to develop preliminary designs in order to more accurately assess impacts in the environmental document. However, granting approval to proceed with final design at this stage would be a premature commitment to one alternative at a time when other alternatives, including the alternative of taking no action, are still being actively considered by the Administration in the environmental process.

However, the Administration recognizes the need to proceed with detailed design activities where such work is necessary to permit the full evaluation of environmental impacts and to permit the consideration of appropriate mitigation measures, e.g., impacts to wetlands, section 4(f) areas and resources covered by section 106 of the National Historic Preservation Act (section 106). The regulation provides for those situations by allowing the applicant to complete all necessary design work needed to complete the EIS or to comply with other environmental laws during the NEPA process. This should not be construed as an authorization to proceed with final design for the entire project, but only for those aspects of the project necessary to consider specific environmental concerns.

The possibility of acquisition of land for a project before completion of the NEPA process was raised by several commenters. The UMTA received comments in favor of both expanding and restricting the scope of advance land acquisition allowed under the regulation. Several commenters suggested that UMTA expand the scope of advance land acquisition because the Surface Transportation Assistance Act of 1982 (STAA) amended section 3(a)(1)(A) of the UMT Act by adding a provision specifically addressing UMTA's discretion to make grants or loans for the acquisition of rights-of-way and relocation for fixed guideway corridor development for projects in advanced stages of alternatives analysis or preliminary engineering. On the other hand, one commenter expressed the opinion that "no acquisition should be allowed prior to completion of the NEPA, process," arguing that hardship or protective buying cannot be accomplished without influencing or limiting the choice of reasonable alternatives.

In weighing the arguments, UMTA considered how to implement the STAA amendment consistently with the agency's responsibilities under NEPA and with the results of pertinent case law governing advance land acquisition. *National Wildlife Federation vs. Snow*, 561 F.2d 227 (D.C. Cir. 1976). The UMTA has concluded, in light of these considerations and a review of the pertinent legislative history, that this amendment was not intended to override the requirements of NEPA.

For UMTA's major fixed guideway projects, the draft and final EISs are developed during alternatives analysis and preliminary engineering. Any authorization for advance land

acquisition during alternatives analysis or preliminary engineering would create a conflict with NEPA if the acquisition could result in a substantial commitment to a particular course of action before the NEPA process was completed. In addition, since UMTA's major investment procedures are integrated with the NEPA process, this would also prejudice the major investment decisionmaking process.

After careful review, FHWA and UMTA still believe that some advance land acquisition may take place on a case-by-case basis without resulting in a substantial commitment to a particular course of action before completion of the NEPA process. Therefore, in this regulation, FHWA and UMTA are maintaining the current practice: that is, the only types of advance land acquisition that FHWA and UMTA will approve before the completion of the NEPA process are "hardship" and "protective" acquisitions. These terms are defined in § 771.117(d)(12) of this regulation.

As in the past, this type of land acquisition is reserved for extraordinary or emergency situations involving a particular parcel or a limited number of parcels within the proposed transportation corridor. It has been FHWA's and UMTA's recent experience that the number of hardship and protective acquisitions on a given project are so few as to not result in a substantial commitment to a particular course of action. The purpose of protective acquisition is to preserve the status quo. Since it serves to protect valuable property and can be easily undone, such acquisition generally will not tilt the balance toward a particular alternative.

Another question is whether acquiring an option to purchase land before completing the environmental process would be an acceptable alternative to assure the availability of land for project purposes. It would be less costly and arguably would constitute a smaller commitment than the actual purchase of land. Generally, UMTA and FHWA maintain that acquiring options to purchase land for a project would tend to bias fair consideration of other project alternatives and violate basic principles of Federal environmental law. Therefore, the same standards apply to options to purchase as to outright purchase of land: before completing the environmental process, only acquisitions for hardship and protective purposes are acceptable.

To obtain approval for hardship or protective acquisition, the applicant should apply for a CE under paragraph 771.117(d)(12). In addition, for FHWA actions, hardship and protective acquisition activities must be processed in accordance with 23 CFR 712.204(d). It should be noted that a CE for advance land acquisition applies only to the purchase of property and does not permit further project development. The restrictions of paragraph 771.113(a) will apply until the Administration completes the NEPA process for the entire proposed action. The FHWA has issued guidelines and UMTA is preparing similar guidance describing the documentation needed to support requests for hardship and protective buying. Documentation supporting these claims will continue to be reviewed in the field offices of FHWA and UMTA.

One commenter suggested that any advance land acquisition be noted in the subsequent EIS or EA. The FHWA and the UMTA have no objection to noting this information in environmental documents, but do not believe it is appropriate to require it under the regulation.

Paragraph (a)(3) has been added to emphasize that in addition to environmental requirements, certain programming requirements must be satisfied prior to the initiation of FHWA funded final design, acquisition, and construction activities. This paragraph is a cross reference to 23 CFR Part 450 and 23 CFR Part 630 and does not create any additional requirements.

Paragraph (b) has been revised to indicate that FHWA approval of the final environmental document is considered acceptance of the general project location and project concepts such as type of facility, interchange locations, and other major features which may be indicated in the environmental document. This paragraph is an indication that FHWA normally will approve for Federal funding a project of the type noted in the final environmental document. However, it does not commit the Administration to fund any specific project or any features identified therein. Final approval of the EIS does not constitute a commitment to fund the project, as noted in this paragraph and in § 771.125(e) of this regulation.

Section 771.115 Classes of actions. Actions treated under this regulation fall in one of the classes outlined in this section. Class I actions are those which typically require an EIS. Class II actions are those which typically are classified as CEs. If it is uncertain whether a particular action requires an EIS, and it requires an EA to establish the significance of the impacts, the action is grouped under Class III. A change in this section was the shifting of the list of examples of CE activities to § 771.117. This has been done in order to group all activities related to CEs in § 771.117.

One commenter suggested deleting the list of Class I actions that remains in § 771.115(a) and, instead, focusing on the definition of significance as applied to environmental impacts in the CEQ regulations. Examples of specific Class I actions are included in the regulation in accordance with § 1507.3(b)(2) of the CEQ regulations. We have referenced the section of the CEQ regulations that addresses the significance of impacts rather than repeating it.

One commenter suggested that the wording be changed in paragraph (a) to indicate that the projects listed under Class I may not in all cases require EISs. The CEQ regulations require that Federal agency procedures include specific criteria for and identification of those typical classes of action which normally require EISs. While there may be individual projects listed in Class I that because of unusual circumstances would not require an EIS, such projects are exceptions to the rule. The wording in paragraph (a) has been changed to parallel the CEQ regulations (40 CFR 1507.3(b)(2)). The intent of dividing projects by class is to provide guidance on the environmental review process that will be followed normally for projects in the class. The FHWA and the UMTA will continue to review individual cases whenever applicants describe circumstances which may have a bearing on the choice of environmental process. The final decision on class of action will be made by the Administration.

In the NPRM, UMTA proposed eliminating exclusive busways as Class I actions because of the potential to construct and operate a busway on or within an existing highway without significant environmental impacts. A number of commenters supported this change. Busways are frequently established by dedicating an existing highway lane for exclusive bus and high occupancy vehicle use and the regulation affords the flexibility to handle such projects with an EA instead of an EIS. The NPRM noted UMTA's intention to continue to require an EIS for construction of a new roadway for buses which is not integrated in an existing highway. This type of project is now listed in the regulation as a Class I action. Other types of busway projects will be reviewed individually to determine the appropriate environmental document, e.g., busways on existing lanes or medians which have off-line facilities such as stations, park-and-ride lots, transfer points, etc.

The UMTA also proposed eliminating "major transportation-related developments" as Class I actions. These were joint public/private urban development projects that were tied into transit terminals or stations. These types of projects normally required an EIS. They were dropped from the list of Class I actions because they are no longer a significant part of the UMTA program.

Several commenters who supported the proposal to remove busways constructed on existing highways from the Class I list suggested that rail lines built in highway medians should be accorded the same treatment. However, the environmental effects associated with the fixed facilities of a rail line—stations, parking lots or structures, storage and maintenance yards—and the changes in travel patterns and land use associated with such projects are normally significant and warrant evaluation in an EIS. Greater variability exists in constructing a busway on an existing highway. Thus, the regulation provides the flexibility to handle the simpler busway projects with a simpler environmental process, while mandating an EIS if the EA shows significant impacts.

Another commenter, noting the change proposed for busway projects on existing highway facilities, argued that the initiation or increase of rail passenger service on rail lines already in use was analogous and should, therefore, not require an EIS. Reference was made to an exemption from State environmental requirements for such projects in California. The UMTA recognizes there may be some cases where a rail rapid transit project proposed on an existing railroad right-of-way can be built and operated with minimal environmental impact. In such cases, the fact that displacement of residences and businesses is avoided or minimized alleviates one potentially significant concern. However, these projects are exceptions which would not warrant a change in emphasis in the regulation. Sometimes rail projects are proposed on railroad rights-of-way that are abandoned or lightly used for freight. In these situations, the rapid transit project may intensify some effects associated with existing railroad operations, e.g., wayside noise, and could introduce new impacts at proposed station locations, such as traffic congestion and parking demand. It should be noted that listing as a Class I action does not preclude the handling of specific cases with EAs. The FHWA and the UMTA will continue to review individual project proposals to establish the appropriate environmental document and level of environmental analysis.

Section 771.117. Categorical Exclusions. CEs are tyes of actions which in the Administration's experience have normally been found not to have significant environmental effects. Designation as a CE speeds the Administration's approval process by eliminating the need for an EIS or EA on an activity proposed for Federal funding. The FHWA and the UMTA proposed several important changes to the process of classifying and approving CEs in the NPRM and many comments were made on the changes. It is important to note that these changes have been made in response to the CEQ's latest guidance to Federal agencies on this subject (48 FR 34263, July 28, 1983). Agencies were encouraged to add the flexibility to their implementing procedures to allow new types of actions to be classified as CEs with minimal documentation required. They were to do this by developing more broadly defined criteria as well as providing examples of typical CEs, rather than a comprehensive list, so that specific actions not previously listed by an agency could be considered for CE status on a case-by-case basis. This regulation generally adopts this approach.

We have amended §§ 771.115 and 771.117 to clasify FHWA's and UMTA's role in reviewing CE designations for proposed projects. These amendments are designed to speed the approval of many smaller projects while focusing attention on projects with particular environmental concerns. This change in procedures is one of the several steps taken by FHWA to comply with the requirements of section 129 of the STAA of 1982.

The FHWA and the UMTA have examined the existing list of categorically excluded actions and separated it into two groups. The first group includes actions which experience has shown almost never involve significant impacts. The second group contains examples of projects which usually have been found appropriate for CE classification but may, depending upon the circumstances, have significant adverse effects (e.g., increased noise, wetlands encroachment, historic site impacts) which would preclude the use of the CE classification. Site location and the surrounding land use are often key factors. Thus, the Administration will require all appropriae information on the area immediately surrounding the proposed project site and any specific impact studies which may be needed to determine whether CE status is appropriate

It should be noted that projects approved on an individual basis will not be added to the list or examples in the regulation. Reviews of individual projects for CE status on a case-by-case basis will be at the field office level, although there will be coordination with Headquarters. Where a pattern emerges of granting CE status for a new type of project, rulemaking will be initiated to determine whether to add such projects to the list of CE examples in the regulation. Section 771.117(e) has been added to the regulation to describe these procedures.

Some commenters objected to the intent of splitting the original CE list into two groups and suggested that the Administration give a one-time designation to all CEs with no further review. This view contrasts sharply with the comments of others who felt the one-time designation for certain CEs would allow some projcts with adverse consequences to escape scrutiny. The FHWA and the UMTA believe that this regulation strikes the proper balance. Only those actions which normally have no effect or minimal effect on the environment are included in the first group of CEs. Furthermore, in unusual circumstances, even these actions must undergo an environmental review if an EIS could be required, as provided in § 771.117(b).

Several commenters expressed the concern that specific environmental laws and administrative requirements might be overlooked if a project qualified as a CE in the NEPA compliance process, particularly in the first group of CE projects, which do not require individual Administration approval. One commenter noted that many of the actions listed in the second group of CEs could have significant effects depending on the location of the activity, thus, they should be subject to the more thorough analysis of an EA.

The final regulation is an effort to strike a reasonable balance between environmental concerns and the reduction of excessive procedures and paperwork. In adopting this approach, it is not the intention to exempt the first group of actions from any appropriate Administration review. Experience has shown that the actions placed in the first group almost never cause significant impacts to the environment and, from the standpoint of NEPA, are properly classified as CEs.

This prior approval with respect to NEPA compliance in no way implies that a project is exempt from the requirements of other laws. All other

laws and procedures still apply. For example, minor modifications to a historic building may require a review pursuant to section 106 or the proposed use of a minimal amount of land protected by section 4(f) may require review under that statute. We believe that these cases will be identified from information in the grant application and in other pertinent planning and programming documents available to the Administration. If there is any doubt over the applicability of a related environmental law or regulation, the Administration will request additional information to help determine whether such requirements apply. These determinations can usually be made with only a brief description of the area immediately surrounding the proposed project site.

The second group of CEs is composed of projects which normally do not involve significant environmental effects when carried out under the conditions or criteria set forth. They generally involve more construction than projects in the first CE group, and their designation as CEs is more dependent on proper siting. Projects in the second group will require documentation from the applicant to clearly establish that there are no significant impacts.

Several commenters expressed concern that the documentation required for the second group of categorically excluded projects defeats the purpose of the CE concept. We believe that this documentation, focused on particular areas of concern, is the only way to proceed while ensuring that federally assisted projects do not cause environmental harm. We expect that the documentation will be briefer that an EA since it will be focused on a limited number of environmental concerns and usually will not include and evaluation of alternatives as is often contained in an EA. Under this approach, projects which appear to meet the general criteria for CEs in paragraph (a) but are not specifically mentioned in the regulation may be approved on a case-by-case basis as provided in § 771.117(d).

Also with respect to CEs, there were numerous suggestions to: (1) Delete certain actions from the CE lists altogether, thus requiring preparation of EAs at a minimum, and (2) move certain CEs from the first group to the second group, requiring some level of supporting documentation, and move some from the second group to the first group. As a result, FHWA and UMTA reassessed all the CEs to determine if their present status was appropriate. Certain refinements are reflected in this final regulation.

One commenter requested that CE status be given to all projects funded under sections 16 and 18 of the UMT Act which deal with elderly and handicapped access to transportation facilities and assistance for non-urban areas, respectively. A new CE has been added to cover modifications to facilities or vehicles for the express purpose of elderly and handicapped accessibility. Many of the projects funded with grants under section 18 are covered by existing CEs, e.g., new bus maintenance facilities, reconstruction of existing buildings, and vehicle purchases. However, a blanket CE for any project that might be proposed under section 18 is inappropriate.

A number of commenters asked for changes to clarify the description of certain CEs. One suggestion dealt with the CE for rehabilitation of rail or bus buildings in which "only minor amounts of additional land are required." We agree with the commenter that the ultimate concern is not the amount of additional land but whether significant environmental effects are involved. However, limiting this CE to situations where only minor amounts of additional land are needed draws a distinction between a rehabilitation or renovation-type project and a major expansion of an existing facility generally requiring more land. We have retained the existing language because there is greater confidence that the project as described would qualify as a CE.

A number of commenters suggested that weigh-station and rest-area construction should be in the first group of CEs. After considering these comments, it was decided to divide weigh-station and rest-area activities into two groups. The reconstruction and/or rehabilitation of existing facilities were added to the first group of CEs. However, because of the issues likely to be involved in the case of new rest areas or weigh stations, it was decided to leave these types of activities in the second group of CEs which requires approval on a case-by-case basis.

A number of commenters also suggested that traffic control devices be moved to the first group of CEs. Because of the wide range of activities that may take place under the broad category of "traffic control devices," the Administration has decided to divide those activities into two groups: (1) Traffic signals in the first group of CEs and (2) ramp metering controls in the second group (which requires Administration approval).

On commenter questioned whether the proposal to categorically exclude the promulgation of rules, regulations and directives which require a regulatory impact analysis was properly conceived, since the need for regulatory impact analysis seems to have little bearing on the possible environmental effects of the rule, regulation, or directive. The Administration agrees and has removed the phrase that refers to an regulatory impact analysis. Furthermore, because the vast majority of Administrative rules, regulations, and directives have not had significant environmental impacts, this action was moved from the second group to the first group of CEs. However, in unusual cases an environmental review will be conducted as required by § 771.117(b).

One commenter objected to removing the prohibition, that is in the 1980 regulation, against categorically excluding bridges on or eligible for the National Register of Historic Places and bridges providing access to barriers islands. This prohibition was removed because it is too general. Projects involving historic bridges or bridges to barrier islands may be properly categorically excluded or may require the preparation of an environmental assessment or an environmental impact statement depending on the severity of the anticipated impacts. The criteria for categorical exclusions presented in § 771.117(b) and the procedure for evaluating "unusual circumstances" in § 771.117(b) provide a suitable mechanism for determining whether, based on specific information regarding project impacts, a categorical exclusion in proper. In addition, since bridges are in the second CE category, historic bridges would always require some documentation that should reveal whether further environmental review is needed. The commenter's concern that historic bridges be adequately protected is addressed by § 771.117(b)(3), that relates to properties protected by section 4(f) or section 106. The barrier island issue is addressed by § 771.117(b)(4), that focuses on inconsistencies with environmental laws and requirements, such as the statutes that protect barrier islands.

In the proposed rule, § 771.117(b) limited the need for further environmental review to "extraordinary" cases. The historic bridge example illustrates that actions on the CE list may sometimes require a full environmental review, depending upon the circumstances. Such cases are unusual, but are not necessarily extraordinary. The indicate the need for environmental review in these and other

similar cases, § 771.117(b) has been revised to describe them as "unusual," rather than extraordinary.

Several comments concerned advance land acquisitions. We believe advance land acquisitions require more documentation than a project description. Therefore, this CE has been included under the second group of CEs in paragraph (d).

Clarification was requested as to whether construction could occur after the land was acquired. This CE is intended to cover the very limited cases where advance land acquisition as set forth in § 771.113(a) is appropriate. The CE does not cover the entire project. Thus, in these cases, even though the land is acquired early, project development cannot occur until the NEPA process is completed and the Administration reaches a decision on whether to implement the proposed project. The CE for advance land acquisition has been modified to clarify this point.

In the 1980 regulation, the CE for advance land acquisition covered hardship and protective acquisitions, as defined in 23 CFR 712.204(d), and acquisitions under section 3(b) of the UMT Act. However, because hardship and protective acquisitions were not specifically referenced in the CE, some applicants have interpreted it as establishing a category of advance land acquisition in addition to hardship and protective acquisitions. The CE has been modified to clarify this point. Thus, the CE for advance land acquisition in the final regulation continues the Administration's existing practice for advance land acquisition. A definition of these terms has been added to the regulation.

It should be noted that the number of acquisitions under section 3(b) of the Urban Mass Transportation Act to date has been very limited and is expected to remain so. The purpose of section 3(b) is to allow the acquisition of land that may or may not be used for mass transit in order to preserve that land before land speculation caused by transit development inflates the price of the land. The UMTA will approve loans under section 3(b) only for unique circumstances, such as acquisition of abandoned rail right-of-way and only where there are no immediate plans for a project. UMTA will review each case separately to determine whether the action requires and environmental review. Where the grantee has definitely planned a mass transit project, section 3(a) is the appropriate section of the UMT Act under which to proceed. Under section 3(a), any major land acquisition requires full compliance with NEPA.

Another commenter asked UMTA to distinguish more clearly the difference between small passenger shelters and bus transfer facilities. The CE for bus shelters covers the separate small shelters typically found throughout a transit system. The bus transfer facility CE refers to focal points of bus activity where several bus routes connect. It includes construction of passenger shelters, loading bays, layover areas, and related street improvements. The primary environmental concerns are the noise, traffic, and safety consequences of frequent bus movements in a new area. However, this CE does not apply to the construction of new bus terminal buildings.

In the NPRM, comments were invited on the specific conditions or criteria which should apply to a CE for rail car storage and maintenance facilities. One commenter recommended against establishing specific criteria for new rail yards since they are typically constructed in areas with compatible land uses and zoning. It was suggested that a project-by-project review would be satisfactory to identify those infrequent cases where a CE may not be appropriate. We agree that rail yards are usually located in areas characterized by industrial or transportation use. However, land-use compatibility, increased traffic, and noise have been issues where non-conforming residential land use is close by. These concerns have arisen with new facilities as well as the expansion of established rail yards. The existing wording has, therefore, been retained to describe the conditions under which approval as a CE is most likely.

There were other suggestions for new types of projects that should be categorically excluded. If, in the Administration's view, the proposal would have insignificant effects on the environment in the great majority of cases, the proposal was adopted. For this reason, as noted earlier, a CE has been added for alterations to make buildings and vehicles accessible to elderly and handicapped patrons. Other suggestions for CEs were not added as examples in the regulation because it was difficult to describe specific conditions or criteria which would provide assurance of no significant environmental effects. However, applicants may still submit new projects that they believe meet the criteria of § 771.117(a) accompanied by documentation supporting the CE designation. If the applicant's proposal for a CE involves new technology or presents environmental impacts with which the Administration has little or no experience, it is likely that an EA will be required to examine the full range of environmental effects from such an action. In introducing flexibility in the CE process, the goal has been to speed the process for projects where there is the greatest confidence as to the insignificance of the impacts. However, this approach also requires a careful look, in the form of an EA, where greater uncertainty exists concerning environmental effects. Under paragraph (d), the Administration has the discretion to review all proposals for categorical exclusions on a case-by-case basis.

A number of comments were also received on paragraph (b) which sets forth the instances when unusual circumstances make it appropriate to require further studies to determine if the CE classification is appropriate. The level of additional study required by this paragraph will vary. In the occasional or rare case where significant impacts are caused by a normally excluded action, an EIS is required. In some cases, only a minor environmental review would be necessary and, in other cases, a full EA may be needed.

One commenter objected to the statement that "substantial controversy on environmental grounds" should trigger the requirement for an environmental study. Both the CEQ regulations and DOT Order 5610.1c list "substantial controversy" as a circumstance when a CE may not be appropriate for a normally excluded action. Substantial environmental controversy over a minor project may indeed indicate the presence of problems requiring further study.

Another commenter objected to the inclusion of significant impacts on properties protected by section 4(f) and section 106 as an example of "unusual circumstances." The point was made that some projects do not involve significant environmental impacts but may still cause effects which must be considered under section 4(f) and section 106. The commenter felt that the applicability of those laws should not automatically trigger a requirement for further NEPA documentation. The proposed language has been retained. Significant impacts on these statutorily protected sites are a clear indication of impacts not appropriately considered as a CE. This mandates a review of impacts better accomplished in an EIS or an EA rather than a separate section 4(f) evaluation. The requirement for an environmental document also underscores the importance the DOT

places on the protection of section 4(f) lands. A provision similar to paragraph (b) is contained in the DOT Order 5610.1c.

Section 771.119. Environmental Assessments. An EA must be prepared for all actions which do not qualify as a CE and do not clearly require an EIS. Studies undertaken solely to determine whether a project qualifies as a CE are not EAs. The purpose of an EA is two-fold. First, an EA should resolve any uncertainty as to whether an EIS is needed. Should the need become evident at any time in the course of the EA process, an EIS should be started. If no EIS is required, the EA process is completed with a finding of no significant impact (FONSI) (§ 771.121). Secondly, to the extent practicable, the EA should contain sufficient information to serve as the record for all environmental approvals and consultations required by law for the action and should include approvals by and consultations with other agencies, as well as those of the Administration. The EA must be made available to the public, although circulation requirements are considerably simpler than those required for an EIS.

One commenter suggested that the notification/distribution requirements for EAs be modified so that interested Federal agencies can be notified directly of the availability of EAs. Our aim is to streamline the environmental review process, particularly for those highway and transit projects that typically do not involve significant environmental impacts and are processed with EAs or as CEs. The EA is a public document, available on request from the applicant or Administration field offices. The applicant must publish a notice of its availability to ensure proper notification to the public. Notice of availability of the EA shall also be sent by the applicant to affected units of Federal, State and local government. The State agency responsible for intergovernmental coordination pursuant to Executive Order 12372 will also be notified. Beyond such notification, we do not intend to require a formal distribution process for EAs. Those agencies and interested parties participating in the early coordination/scoping process should be notified of the availability of an EA and a subsequent FONSI, should either be approved. Projects normally requiring EISs which are processed with EAs will be subject to the full, early coordination and public involvement requirements described in § 771.119.

On commenter raised a question about § 771.117(e) of the NPRM under which the Adminstration encouraged applicants to prepare the EA and make it available prior to any public hearing that was required to be held on a proposed project. The concern was that the applicant must shoulder the cost of preparing an EA to satisfy a Federal requirement and would not be reimbursed for the cost of preparing the document if the grant application was subsequently disapproved. Environmental analysis is frequently funded in grants for planning or preliminary engineering which precede any Federal decision on construction funding. Thus, the possibility exists that an applicant may receive Federal funding for environmental analysis on a proposed project which, for a variety of reasons, does not advance to construction. Acceptance or approval of an EA by the Administration should not be construed as a conditional approval of the project. Lacking an earlier grant for planning or design, the applicant may have to bear the cost of preparing an EA. In most cases, however, preparation of an EA, in contrast to an EIS, does not entail a major investment of staff time and money.

When a public hearing is to be held, the EA should be prepared and made available for a reasonable period of time prior to the hearing. We will continue to encourage applicants to coordinate the EA and public hearing requirements in order to meet our responsibilities under section 1506.6 of the CEQ regulations. The preamble discussion for paragraph 771.111(i) treats the coordination of public hearings and EA preparation for transit projects funded under Sections 9 and 9A of the UMT Act.

One commenter suggested that the regulation be amended to give the Administration the option to hold a public hearing upon request. This comment has not been adopted because making this decision optional would fall short of the requirements of FHWA and UMTA statutes which mandate that an opportunity for a public hearing be afforded (see paragraphs 771.111 (h) and (i) of this regulation).

In paragraph (f), the former reference to a "shorter" time period than 30 days for comments has been changed to a "different" time period. This change was made to cover the situations where the State or local applicant or the Administration may feel a longer time period is appropriate.

The NPRM required that after any public review period for an EA, the applicant provide the Administration with a summary of any comments received. The final rule provides, instead, that the actual comments be transmitted. This change eliminates the need to prepare a summary and avoids any possibility of misinterpreting comments.

Paragraph (g) also states that an EA, like an EIS, should be the vehicle for compliance with all applicable environmental laws and regulations. This addition merely restates in the EA section the long-standing DOT policy of a "one-stop" environmental process.

Section 771.121. Findings of no significant inpact. This section remains unchanged from the NPRM except for some minor editing to improve the readability of the section.

Section 771.123. Draft environmental impact statements.

Paragraph (a) of this section and § 771.119(i) have been clarified to underscore the fact that an environmental impact statement need only be prepared when significant impacts on the environment will be or are likely to be caused by the proposed action. The environmental studies defined in § 771.107(a) or the EA discussed in § 771.119 would provide the basis for an informed judgment if there is any doubt about the magnitude of the environmental impact.

Paragraph (d) has been revised to clarify the requirements when a consultant is involved in the EIS process. This paragraph is now consistent with the definitions contained in paragraph 771.109(c) of this regulation. The FHWA deals only with SHAs and State Departments of Transportation. Accordingly, all FHWA applicants qualify as "Statewide agencies." The FHWA approval of consultants is needed only when Federal funds will be used to reimburse the consultant. In those situations, other FHWA regulations govern the consultant selection process. In the case of UMTA-funded activities, UMTA should be apprised of the possible use of consultants before work is undertaken. Although UMTA will not normally participate in the consultant selection, staff will advise applicants if there is a need for interdisciplinary capability in preparing an environmental document and will, when necessary, jointly evaluate consultants' qualifications. The UMTA will apprise applicants of paragraph 1506.5(c) of the CEQ regulations, governing work by consultants and possible conflict of interest.

Paragraph (h) has been amended to indicate that the draft EIS shall be available at the public hearing as well as a minimum of 15 days in advance of the public hearing. As expected, there were comments favoring the shortening

of the minimum period to 15 days and comments objecting that this is unreasonably short. The statutes governing FHWA and UMTA programs require only that adequate notice of any public hearings be given. The change was made to be consistent with the CEQ regulations (section 1506.6(c)). We recognize, however, that the typical EIS with a 45-day circulation period would allow a 30-day notice for a public hearing with no delay in the environmental review process. We will encourage applicants to give greater than 15-day notice whenever possible in order to foster public involvement in the NEPA process.

One commenter asked that FHWA and UMTA specify in the regulation their time for reviewing EISs. Setting time limits for the major steps in the EIS process is a task accomplished in the scoping process. The time periods will vary from project-to-project depending on the size and complexity of the project and other factors set forth in section 1501.8 of the CEQ regulations dealing with time limits.

Section 771.125. Final environmental impact statements. As with the section dealing with draft EISs, few changes were proposed to our final EIS procedures. There was support for the proposed change in paragraph (a) eliminating the requirement to describe in the final EIS the procedures to be followed to assure that all environmental mitigation measures are implemented. The FHWA and the UMTA's general approach to ensure that mitigation is carried out has been outlined in paragraph 771.109(b). Any further details would be developed on an individual project basis by the applicant and Administration. This does not represent a change in the Administration's commitment to take all practicable steps to mitigate any adverse environmental consequences caused by transportation projects.

There also was support for the proposed change to identify, rather than describe, mitigation measures. However, UMTA and FHWA have decided that the requirement of describing mitigation measures should be retained. Accordingly, the final regulation continues the existing practice of a full description of mitigation measures in the final environmental document, to the extent permitted by the level of design. When details on mitigation measures have not been developed at the time the final EIS is being prepared, the final EIS should describe the measures in as much detail as possible and give an assessment of the effectiveness of such measures in reducing environmental harm. When there is uncertainty over the choice of mitigation measures, the range of measures under consideration should be fully described, and the final EIS should address mitigation in terms of the results that will be achieved, e.g., conforming to governmental standards or plans or meeting criteria developed for specific projects. These measures will be summarized in the Record of Decision (ROD) for projects requiring EISs.

Many commenters supported the change eliminating the need for prior concurrence by the Administration Headquarters on certain EISs. There was a dissenting view that Headquarters oversight was needed to ensure that DOT environmental protection responsibilities were being fully met. The delegation of greater EIS responsibility to field offices is an important change from the standpoint of streamlining the environmental review process. This provision allows routine EISs to be completed more quickly. Internal procedures in the FHWA and the UMTA will ensure that EISs for projects with major unresolved issues are reviewed by Headquarters. The regulation specifies those circumstances in which Headquarters' concurrence will normally be required.

The provision for legal review of final EISs has been retained. Experience has shown this to be an important requirement.

Paragraph 771.123(d)(2) of the NPRM which deals with FHWA actions on programmatic documents has been dropped from the final rule. The FHWA has issued internal operating instructions that all programmatic environmental documents will be sent to the Administration Headquarters for action. Since this is an internal Administration practice, not a requirement imposed by the Administration on its applicants, it was decided to eliminate that provision from the regulation.

Paragraph (e) concerning the significance of the Administration's approval of the final EIS has also been modified to better emphasize that approval does not constitute a present or future commitment of funds to the preferred alternative.

Section 771.127. Record of decision. The basic mechanism for the ROD remains unchanged. The ROD lays out the basis for the decision as specified in 40 CFR 1505.2 and summarizes the mitigation measures that will be incorporated in the project. The last sentence of paragraph (a) of the NPRM has been eliminated. That sentence indicated a ROD was not required for projects where the draft EIS was filed with EPA prior to July 30, 1979. We believe that this "grandfather" clause is no longer appropriate and have eliminated it in response to comments.

The ROD is a public document and will be made available to the public on request. However, FHWA and UMTA will not routinely distribute RODs to all those who received the final EIS, nor will we distribute RODs on all projects to an individual agency. One commenter asked that we seek outside consultation and review whenever the Administration changes the proposed action and a revised ROD has to be prepared. If the proposed action changes to an alternative fully evaluated in the final EIS, but not identified as the preferred alternative in that document, the Administration will issue a new ROD and distribute it to everyone who received the final EIS. The regulation states that this distribution will be made to the extent practicable, meaning that documents will be sent to the addresses of record, but the Administration cannot ensure that people who have changed addresses will be reached.

Section 771.129. Reevaluations. This section directs the applicant to consult with the Administration prior to proceeding with major project activities, such as land acquisition and construction, to assess any changes that have occurred and their effect on the validity of the environmental document.

After the environmental process has been completed, the Administration is free to make a funding decision and proceed with construction of a project. The decision to implement a project may occur soon after the final environmental document is approved and circulated or it may be deferred for various reasons. Where a substantial period of time has elapsed since the initial environmental review process, the Administration needs to determine whether existing environmental documents and findings remain valid before moving ahead with construction. The Administration must also ensure that mitigation measures stated as commitments in environmental documents have been incorporated in appropriate contract documents, plans, specifications, and estimates.

Many commenters objected to the proposal in the NPRM for a written evaluation, required in all cases, to assess whether the final EIS was still current. Based on these comments, the Administration has agreed that a written evaluation of the final EIS should not be required before every major project approval or filing for a Federal permit. Instead, the Administration has substituted two

paragraphs. One of these requires a written evaluation of the final EIS if major steps to advance a project have not been taken within 3 years of final EIS approval or the last major Administration approval or grant. The purpose of this paragraph is to require a careful look at proposed projects which have not gone to construction and have been inactive for a relatively long time since the final EIS or last major step in project development. A similar paragraph appeared in the 1980 regulation but was deleted in the NPRM.

The second paragraph, paragraph (c) in the final regulation, requires consultation in all cases not covered by paragraphs (a) and (b), but leaves discretion to determine on a case-by-case basis whether a written report is required. The Administration will determine whether the changes are significant enough to warrant a supplemental EIS (as outlined in paragraph (b)). The Administration believes that the time period of paragraph (b) and the flexibility of paragraph (c) would accomplish the purpose of the NPRM, without imposing the burdens objected to by the commenters.

Normally, the reevaluation requirements apply at the right-of-way authorization stage and at the construction stage. However, on the more complex projects, the Administration may identify additional points at which it would be appropriate to reevaluate the status of the previously approved environmental document. The regulation is structured to ensure that the Administration has a current and valid environmental document on file prior to permitting the applicant to proceed with any subsequent phase of the pending project.

Section 771.130. Supplemental environmental impact statements. Paragraph (a) retains the provisions in the 1980 regulation that a draft or final EIS may be supplemented at any time. This provision has been included in the NPRM. In addition, it makes clear that a supplemental EIS may be supplemented at any time.

Paragraph (a) also identifies those situations in which a supplemental EIS must be prepared. A supplemental EIS is required where changes in the proposed action or new information or circumstances relevant to environmental concerns and bearing on the proposed action would result in significant environmental impacts not already evaluated in the EIS. The language in paragraph (a) was changed to more closely parallel the CEO regulations. It replaces § 771.129(b) of the 1980 regulation which required a supplemental EIS when there had been "significant changes in the proposed action, the affected environment, the anticipated impacts, or the proposed mitigation measures." The word "change" in the regulation is no longer limited to the four categories set forth in the 1980 regulation. Instead, this paragraph focuses the determination of whether a change or new information is "significant" to the anticipated impacts of the proposed action. The regulation is intended to distinguish, for example, between new information that may be very important or interesting, and thus, significant in one context, such as to the scientific community, and yet should not be considered "significant" so as to trigger preparation of a supplemental EIS because the information does not result in a significant change in the anticipated environmental impacts of the proposed action.

Paragraph (b) identifies two circumstances in which a supplemental EIS is not required. Paragraph (b)(1) provides that no supplemental EIS is required where changes or new information would mitigate or lessen adverse impacts that have already been evaluated in the EIS and do not cause any other environmental impacts that are significant and which were not evaluated in the EIS. This provision is intended to cover primarily the situation where a proposed action is down scaled or additional mitigation measures are incorporated in a project. Changes or new information that only reduce impacts and are of the same character as those discused in the EIS could include, for example, less right-of-way taken, fewer relocations, or reduced noise levels as a result of additional noise walls. This section only applies where the change or new information does not cause any other impacts that are significant. If the change or new information results in impacts that were not evaluated, a supplemental EIS would be required if the new impacts are significant. Thus, in response to comments on the NPRM, the regulation recognizes that even beneficial changes may be significant and require a supplement if they result in a type of impact that was not evaluated in the original EIS. Further, if previously evaluated impacts become significantly worse, so that the environmental impacts of the action are greater than thought initially, a supplemental EIS would also be required. For example, a supplemental EIS would continue to be required where mitigation measures, presented as commitments in the final EIS, are changed or withdrawn, thereby creating new and significant environmental effects.

Paragraph (b)(2) indicates that a supplemental EIS will not be necessary if a decision is made to fund an alternative fully evaluated in a previous EIS but not identified therein as the preferred alternative. In those situations, a revised ROD must be prepared and provided to all parties that received a copy of the final EIS. A supplemental EIS would be required if the impacts from the alternative now designed as the preferred alternative were not fully evaluated and appropriate mitigation measures included in the original EIS. After a revised ROD is prepared, public and agency notification of the change in the recommended alternative is essential. The specific methods used to notify the public of the change will be determined by the Administration on a case-by-case basis.

Paragraph (c) is new paragraph that expresses in slightly different terms a provision contained both in the 1980 rule and the NPRM. If the Administration is uncertain whether the proposed changes to the project would result in significant environmental impacts, it may require the applicant to prepare an EA or environmental studies to aid in determining the significance of the effects. An EA would be appropriate where a number of different environmental effects need to be assessed and, in the Administration's view, there is uncertainty as to the significance of these effects. Also, an EA is warranted if the Administration feels that an examination of alternative routes, sites, or designs (beyond the normal consideration of design options as the project is being refined) might identify ways to avoid or mitigate probable adverse effects. If these effective are found to be not significant, the Administration will document its decision with a notation to the files for projects where environmental studies were prepared and with a FONSI for projects where an EA was prepared.

Several commenters objected to the paragraph in the NPRM which described circumstances under which supplemental EISs may be needed for UMTA's major investment projects. The concern was that this would add to an already lengthy EIS process. This provision has been modified and retained as paragraph (e). It does not require that supplements be prepared in all cases; it gives UMTA the discretion to prepare such a document in those cases where a substantial body of new information relevant to environmental concerns has been developed.

Although it is similar to tiering in that the environmental focus is sharpened as project details are developed, a

supplement eliminates the need to prepare two separate draft and final EISs as in tiering. The UMTA will continue to require a draft EIS at an early stage of project planning for major investments (i.e., alternative analyses); thus, we want to preserve the option of preparing a supplemental draft EIS when circumstances dictate.

Section 771.129(b) of the 1980 regulation stated that a decision to prepare a supplemental EIS does not require withdrawal of the previous approvals for those aspects of the proposed action not directly affected by the changed condition or new information. While the 1980 regulation was silent on whether activities already in progress under the prior approval should be suspended, it has generally been held that such activities need not be suspended. In addition, it has been held that new approvals of activities outside the scope of the supplemental EIS may be granted while a supplemental EIS is being processed.

Provisions have been added to paragraph (f) specifically to permit these practices. These provisions apply only to supplemental EISs of limited scope. Where the supplemental EIS requires a comprehensive reexamination of the entire project or more than a limited portion of the project, then the Administration would suspend any activities that may have an adverse environmental impact or prejudice the selection of reasonable alternatives.

Section 771.131. Emergency action procedures. This section is unchanged from the NPRM.

Section 771.133. Compliance with other requirements. This section is unchanged from the NPRM.

Section 771.135. Section 4(f) (49 U.S.C. 303). This section sets forth the procedures for applying section 4(f). There have been few substantive changes made from the 1980 regulation. Those that have been made are designed to give the Administration more flexibility in dealing with particular actions or to clarify existing requirements. We do not believe that any of the changes diminish the substantive protection provided section 4(f) sites.

Numerous comments were received on this section. To a large extent, these comments urged the Administration to narrow the situations in which section 4(f) would apply. For example, some commenters expressed frustration with the application for section 4(f) requirements to acquisition of minor amounts of land resulting in little or no impact on the site. The legislative history of section 4(f) makes clear that the "nibbling away" of section 4(f) lands by repeated minor acquisition was of primary concern to Congress. As a result, the DOT and the courts have always taken the position that even minor takings require the preparation of a section 4(f) document.

Paragraph (c) has been revised to emphasize that the "entire resource" must be found to be not significant before the Administration can determine that section 4(f) requirements are not applicable. Furthermore, determination that an entire area is not significant is subject to review by the Administration prior to a determination that section 4(f) requirements are not applicable. This has been a longstanding Administration practice and the change in the regulation states existing practice.

Paragraph (d) addresses the application of section 4(f) to publicly owned lands managed for multiple use. Typically, multiple use management is applied to the natural resources on large tracts of land where such resources can serve a variety of needs. Section 4(f) will apply only to those parts designated or being used for park, recreation, or wildlife refuge purposes. It should be noted that the multiple-use concept does not apply within areas which have been designated as parks, recreation areas, or wildlife and waterfowl refuges. Section 4(f) applies throughout such areas. Historic sites were included in this paragraph in the NPRM but have been eliminated in the final regulation because it was felt that this was inconsistent with the approach for identifying historic sites in paragraph (c). In addition, paragraph (d) has been revised from the NPRM to state more clearly the procedures for applying section 4(f) to multiple use lands

Paragraph (f) clarifies existing FHWA and UMTA practices on the application of section 4(f) to existing transportation facilities. Examples include highway bridges, railroad stations, and terminal buildings which are on or eligible for the National Register Historic Places and proposed for improvement with Federal funds. Most of the commenters on this paragraph favored the proposed provision. The NPRM indicated that section 4(f) requirements did not apply to "work" on transportation facilities under certain circumstances. The final regulation clarifies those circumstances and substitutes for "work" the term "restoration, rehabilitation or maintenance" of transportation facilities. The intention of this change is to better define the key concept "use."

The overriding purpose of section 4(f) was to protect certain publicly owned lands and historic sites from road building and other projects, except in extraordinary circumstances. Toward that end, section 4(f) restricts the approval of projects which require the "use" of certain publicly owned parks and recreation areas and any historic sites. The applicability of section 4(f) in the first instance, therefore, turns on whether a project requires "use" of the land in question. Courts construing the term "use" under section 4(f) have focused on whether the proposed project actually takes or significantly adversely affects the site in question. Accordingly, UMTA and FHWA believe that if a project involves a facility that is already dedicated to transportation purposes (so there is no taking), and does not adversely affect the historic qualities of that facility, then the project does not "use" the facility within the meaning of section 4(f). If there is no use under section 4(f), its requirements do not apply. This construction is consistent with the purpose of section 4(f) and with case law on this issue. Accordingly, the Administration will evaluate any proposed restoration, rehabilitation or maintenance activities of transportation facilities that are on or eligible for the National Register to determine if the criteria of paragraph (f) are met. If those criteria are met, then the work may proceed without a section 4(f) evaluation.

One commenter described paragraph (f) as having alternative criteria. This is incorrect. Both criteria must be met in order for the paragraph to apply.

Some commenters thought paragraph (f) confused the responsibilities of UMTA and FHWA under section 4(f) with our responsibilities under section 106 of the National Historic Preservation Act. The UMTA and FHWA are well aware that section 4(f) and section 106 have distinct requirements. However, in our experience, there is overlap between the analyses necessary to meet the requirements of sections 4(f) and 106. The UMTA and the FHWA's objective is to use a coordinated approach while retaining the distinct requirements of sections 4(f) and 106. If a project will adversely affect the historic qualities of the transportation facility, then the project will require the use of the facility under section 4(f), and the requirements of that provision will apply, i.e. the Administration will evaluate avoidance alternatives and measures to minimize harm to the degree necessary to make the determinations required by paragraph (a). At the same time the Administration will also comply with the separate, consultation requirements of Section 106.

One commenter suggested that paragraph (f) should apply to all section 4(f) properties, not just transportation

facilities. However, the rationale for paragraph (f) only applies to transportation facilities. Therefore, the application of paragraph (f) remains limited to transportation facilities.

Paragraph (g) deals with the application of section 4(f) to archeological resources. Whether or not section 4(f) applies to such resources will depend primarily on whether the value of the resource can best be realized through a data recovery program. The degree to which the value of the resource is tied to a particular site must also be considered. These determinations are always made in consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP).

If it is decided, after consulting the SHPO and the ACHP, that data recovery is appropriate and there is no need to preserve the resource in place, section 4(f) will not apply. However, section 4(f) will apply in case where date recovery is deemed appropriate, and, in addition, there is an overriding concern to preserve a major portion of the resource in place, e.g., for the purpose of public interpretation.

If data recovery is determined to be inappropriate, the application of section 4(f) will depend on the reason underlying this determination. If preservation in place is the paramount concern or if it is determined that there are not adequate techniques to properly recover the resource, section 4(f) will apply. However, if a data recovery program is deemed inappropriate becasue the site has minimal value in terms of scientific research, section 4(f) would not apply. This latter situation often arises when a proposed transportation project would affect a number of sites all of which will reveal the same information. Where an adequate data recovery program focuses on a representative site or sites, it may be determined that the remaining sites would yield no further values. Thus section 4(f) would not apply.

In reaching judgments on the value of the archeological resource, the desirability and feasibility of a data recovery plan, and the need for preservation in place, the views of the SHPO and the ACHP will be given substantial deference. The intent of this provision is not to unnecessarily narrow the application of section 4(f) when dealing with archeological sites, but, rather, to apply the protections of section 4(f) to the situations for which they were originally intended. Frequently, the greatest value of the resource can be realized through data recovery. In those cases the primary mandate of section 4(f)—to investigate every feasible and prudent alternative to avoid the site—would serve no useful purpose.

Paragraph (g) on archeological properties also retains a provision in the 1980 regulation concerning the discovery of archeological resources during project construction. Where section 4(f) applies, the section 4(f) process will be expedited. Noting that late designation of historically significant properties has posed problems in the past by invoking section 4(f) protection late in project development, several commenters proposed cut-off points after which a property newly designated for the National Register of Historic Places would not be afforded section 4(f) protection. Paragraph (h) deals with late designations of parks, recreational areas, and historic sites. With respect to historic and cultural properties, the regulation establishes an affirmative responsibility of the Administration and the applicant to identify historic properties on or eligible for the National Register of Historic Places. This is to be done early in the NEPA compliance process; thus, it is not expected that there will be late identification of historic buildings or structures. However, unidentified archeological resources do pose problems and paragraph (g) sets forth an expedited approach for these cases.

Another commenter found the regulation unclear as to how properties "on or eligible for the National Register" would be identified, and questioned whether only those properties known to the SHPO would be considered. Particularly where large projects are concerned, FHWA and UMTA, in cooperation with the applicant, will undertake a survey to identify properties which are potentially eligible for the National Register. The Administration or the applicant will seek assistance from the SHPO in this identification effort but a State register or list of historic properties provided by State and local officials does not relieve FHWA or UMTA from the need to undertake a comprehensive inventory. If the SHPO indicates that an adequate inventory of the area has already been completed, this will normally satisfy Federal requirements.

A sentence has been added to paragraph (i) in recognition of FHWA's use of programmatic section 4(f) evaluations. In such cases, coordination and documentation are usually accomplished in two phases. The first phase, the development of the programmatic section 4(f) evaluation, entails coordination with interested agencies and organizations, and culminates in the issuance of a document (the programmatic section 4(f) evaluation) which defines the criteria and procedures for its use and contains requisite legal findings. The second phase, the use of the programmatic evaluation on a specific project, involves coordination with the officials with jurisdiction over the section 4(f) resource in question and documentation sufficient to demonstrate that the procedures set up by the programmatic evaluation has been followed. The UMTA currently has no plans to issue any programmatic section 4(f) evaluations.

Paragraph (n) adopts a provision set forth at § 771.133(m) of the NPRM. It emphasizes that the decision to prepare a supplemental environmental document must be made pursuant to § 771.130 of this regulation, independent of any decision to prepare new or separate section 4(f) documentation. The mere change in legal status of an area to which section 4(f) applies does not require such a supplemental document if the environmental impacts of the action on the area or the site have already been evaluated. Similarly, changes in the action which may generate additional section 4(f) requirements would not also require supplemental environmental documentation if the changes were not environmentally significant.

Paragraph (n) has also been modified to clarify that project activities need not be suspended and that new project approvals may be granted during the preparation of a separate section 4(f) evaluation when it is prepared late in project development. The Adminstration will hold in abeyance those aspects of the project that may prejudice the consideration of avoidance alternatives or measures to minimize harm, but may proceed with other elements of the project.

Section 771.137. International actions. This portion of the regulation has been taken from DOT Order 5610.1C. The Administration did not receive any comments on this section. However, certain editorial changes were made to clarify the application of this section to FHWA and UMTA programs.

Section 771.111(h) Public Involvement. On January 31, 1985, the FHWA published at 50 FR 4526, Docket No. 85-12, a NPRM; amendment and rescission of public involvement regulations. The purpose of this proposal was to eliminate confusing regulatory duplication as part of FHWA's overall efforts to institute a streamlined environmental process in which public involvement is fully integrated with

other project development and environmental procedures.

The FHWA has had two major regulations which pertain to public involvement. Detailed requirements for public hearings and location and design approval appear in 23 CFR Part 790. Beginning in 1974, the FHWA provided an alternative process for public involvement/public hearings and project location approval. This alternative process has given the States more flexibility in developing public involvement programs which are better integrated into the States' project development processes.

In order to avoid the confusion and inefficiency of two separate, but duplicative public involvement regulations, this final rule rescinds 23 CFR Part 790 and consolidates in 23 CFR 771.111(h) all regulatory requirements for public involvement in the development of Federal-aid highway projects. To allow the fewer than 10 States still conducting public hearings under 23 CFR Part 790 time to adopt new public involvement/public hearing procedures which satisfy the requirements of 23 CFR 771.111(h), the effective date of the rescission of Part 790 has been delayed 1 year after the publication of this notice in the **Federal Register.**

In addition, individual public involvement requirements appear at 23 CFR 650.109. The FHWA is consolidating all public involvement requirements in 23 CFR 771.111(h). Thus, § 650.109 is rescinded as a technical amendment in this final notice. This will remove the specific requirement by FHWA that significant floodplain encroachments be identified in public hearing notices. Section 771.111(h)(2)(iv) has been modified to require that public hearing notices provide information required to comply with public involvement requirements of other laws, Executive Orders and regulations. This would cover the requirement for a public notice of encroachments as required by Executive Order 11988, "Floodplain Management." In addition, FHWA plans to issue technical guidance to ensure that notice of encroachment is provided as part of the public notice.

The FHWA believes that 23 CFR 771.111(h), as amended in this final rule, will result in better public involvement. It more clearly encourages early identification of issues, early consultation and continuing coordination with concerned members of the public, and early resolution of issues.

No major changes are being made in existing programs, policies, and procedures with respect to public involvement or design approval. The rescission of 23 CFR Part 790 does not in any manner eliminate the requirements for design approvals under 23 U.S.C. 106, 109, and 112. Design submissions and approvals to meet these requirements are carried out according to procedures developed by the FHWA and the State highway agencies. These procedures have been tailored to fit the specific project-development processes of each State highway agency.

Eight comments, all from State highway agencies, were received on the NPRM. The FHWA has given the following consideration to these comments.

Three commenters supported the rescission of 23 CFR Part 790 and the simplification of FHWA's regulations concerning public involvement.

In the NPRM, the FHWA proposed linking the conditions triggering a required public hearing to the classification of projects according to their environmental documentation. However, two commenters correctly pointed out that one of the proposed public hearing criteria (Class II and III projects with significant environmental effects) in 23 CFR 771.111(h)(2) was inconsistent with the definitions of Class II and Class III projects found in 23 CFR 771.115. The FHWA had decided to return the wording of the criteria triggering a required public hearing to the four criteria previously found in 23 CFR 771.111(h). This will assure that there is no change in the opportunities for a public hearing as a result of the present rulemaking.

Two SHAs observed that the criteria for public hearings on Class III projects are less stringent than their current procedures which require a public hearing for all Class III projects. This final rule states minimum Federal criteria for public involvement on Federal-aid highway projects. If, in its public involvement/public hearing procedures, a State chooses to exceed these Federal requirements, that is the State's prerogative. Thus, in their public involvement/public hearing procedures States may require public hearings for all Class III projects.

One western State highway agency expressed concern that public hearings for Class II and III projects requiring substantial amounts of right-of-way resulted in some hearings of little or no public interest, since the projects involved only one or two landowners. The commenter asked that "substantial" right-of-way acquisition be replaced by "sensitive" right-of-way acquisition. The FHWA believes the regulation provides for this situation through the public hearing opportunity. The State highway agency may advertise an opportunity for a public hearing. Except to the extent required by 23 U.S.C. 128, if a project does not arouse public interest, a public hearing need not be held.

It was suggested by two commenters that requiring submission to the FHWA of a written, verbatim transcript is unnecessary for some public hearings. The revised regulation simply retains and repeats the statutory requirements of 23 U.S.C. 128 for transcripts.

One commenter expressed concern that the reevaluation of a project's public involvement activities not become a separate procedural reevaluation in addition to the substantive reevaluation of the project's environmental document under 23 CFR 771.129. The NPRM may not have been clear that the reevaluation of public involvement is intended to be based on the project reevaluation. The wording of the regulation has been changed to make this relationship clearer.

In addition, the FHWA has clarified wording at several points and deleted reference to the inclusion of other agencies and governmental jurisdictions in public involvement/public hearing procedures and to other agencies receiving notices of public hearings (23 CFR 771.111(h)(2) (ii) and (iv)). Coordination with other agencies and governmental jurisdictions is addressed in 23 CFR 771.111(a), 771.119, and 771.123 (c) and (g). Written statements from the public to accompany the public hearing transcript have been more clearly defined in 23 CFR 771.111(h)(2)(vi). Publication in the Federal Register of notices of availability of new public involvement/public hearing procedures has been eliminated as not being an effective way to reach residents of specific States. The FHWA encourages States to use appropriate ways of communicating the provisions of their public involvement/public hearing procedures to residents. Separate reference to mitigation measures as an element of the public hearing presentation has also been deleted (23 CFR 771.111(h)(2)(v)(D)) because the beneficial impacts of mitigation measures are included in the required discussion of impacts.

As a result of the rescission of 23 CFR Part 790 and amendments to 23 CFR 771.111(h), those few States currently under 23 CFR 790 must submit procedures for approval under Section 771.111(h); however, these States will at the same time have the opportunity to gain flexibility to conduct public hearings in a way which is compatible with the State's own project development process. The remaining

States for which alternate public involvement/public hearing procedures already have been approved pursuant to 23 CFR 771 are not required to adopt new public involvement/public hearing procedures.

The public involvement procedures developed pursuant to this section must be sufficient to meet the public hearing and other public involvement requirements imposed by law or regulation on FHWA. Furthermore, in implementing this section, the FHWA urges the States, including States with procedures already approved by FHWA, to consider the public involvement needs of other State and Federal agencies with approval, permitting or consultation responsibilities for highway actions. The FHWA has engaged in extensive discussion with Federal agencies having such responsibilities in an effort to find ways to expedite the highway approval process. One of the most effective ways of accomplishing this goal is to avoid multiple and other duplicative public hearings or other public meetings. Section 771.111(h)(2)(i) should be read broadly to encourage the States to adopt public involvement proceudres which accommodate the needs of as many other involved State and Federal agencies as practicable.

Implementation

Other Federal agencies are often involved in reviewing the environmental effects of UMTA and FHWA actions. It is important that these agencies have an opportunity to provide feedback on how well they perceive that interagency coordination is working under the new regulation. To give them this opportunity, FHWA will sponsor a series of meetings, region by region, to air issues of mutual concern pertaining to this regulation. FHWA plans to hold these meetings about a year to a year and a half after this regulation becomes effective.

Regulatory Impacts

The Administrators of FHWA and UMTA have determined that this document does not contain a major rule as defined by Executive Order 12291. However, it is a significant rulemaking action under Department of Transportation regulatory policies and procedures because important departmental policy as implemented by FHWA and UMTA is involved.

A regulatory evaluation has been prepared and is available for inspection in the FHWA docket room. A copy may be obtained from Mr. Frederick Skaer or Mr. A. Joseph Ossi at the addresses provided under the heading "For Further Information Contact."

The amendments impose no additional requirements. The anticipated impacts include the elimination of duplicative requirements and the increase in decisionmaking authority for the Administration's field offices. By streamlining the project development process, the amendments should reduce project development time and costs. Economic savings will be realized through changes which permit more efficient processing of legally required documentation.

With regard to the public involvement requirements which were the subject of a separate NPRM (50 FR 4526), since there will be no substantial change in the approach FHWA has traditionally employed in dealing with public involvement, it is anticipated that this action will not have a significant economic impact. The economic impacts, if any, would result in administrative savings caused by the elimination of procedural duplication.

The impact of the other amendments will fall primarily on Federal and State and local governments. It is possible that application of this rule could have an adverse economic impact on small governmental jurisdictions that must prepare environmental documents. However, the potential impacts derive primarily from NEPA and not from the procedures contained in this rule. For these reasons and under the criteria of the Regulatory Flexibility Act, FHWA and UMTA hereby certify that this document will not have a significant economic impact on a substantial number of small entities.

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the information collection requirements contained in this document are being submitted for approval to the Office of Management and Budget (OMB).

List of Subjects in 23 CFR 771 and 790 and 49 CFR 622

Environmental impact statements, Grant programs—transportation, Highways and roads, Highway location and design, Public hearings, Reporting and recordkeeping requirements, Mass transportation, Historic Preservation, Parks, Public lands—multiple use, Recreation areas, Wildlife refuges.

(Catalog of Federal Domestic Assistance Program Numbers: 20.205, Highway Research, Planning and Construction; 20.500, Urban Mass Transportation Capital Grants; 20.501, Urban Mass Transportation Capital Improvement Loans; 20.504, Urban Mass Transportation Technology; 20.505, Urban Mass Transportation Technical Studies Grants; 20.506, Urban Mass Transportation Demonstration Grants; 20.507, Urban Mass Transportation Capital and Operating Assistance Formula Grants; 20.509, Public Transportation for Rural and Small Urban Areas; 20.510, Urban Mass Transportation Planning Methods, Research and Development; 23.003, Appalachian Development Highway Systems; 23.008, Appalachian Local Access Roads. The regulation implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

In consideration of the foregoing, Chapter VI of Title 49 and Chapter I of Title 23, Code of Federal Regulations, are amended as set forth below.

Issued on August 21, 1987.

Robert E. Farris,

Deputy Federal Highway Administrator.

Alfred A. DelliBovi,

Deputy Administrator, Urban Mass Transportation, Administration.

1. Subpart A of Part 622 of 49 CFR is revised to read as follows:

TITLE 49—TRANSPORTATION

CHAPTER VI—URBAN MASS TRANSPORTATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Subpart A—Environmental Procedures

Sec.

622.101 Cross-reference to procedures.

Authority: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 1601 *et seq.*; 49 CFR 1.51.

Subpart A—Environmental Procedures

§ 622.101 Cross-reference to procedures.

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and related statutes, regulations, and orders are set forth in Part 771 of Title 23 of the Code of Federal Regulations.

2. Part 771 of 23 CFR is revised to read as follows:

TITLE 23—HIGHWAY

CHAPTER I—FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

SUBCHAPTER H—RIGHT-OF-WAY AND ENVIRONMENT

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Sec.

771.101 Purpose.
771.103 [Reserved]
771.105 Policy.
771.107 Definitions.
771.109 Applicability and responsibilities.
771.111 Early coordination, public involvement, and project development.
771.113 Timing of Administration activities.

Sec.

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109, 128, 138 and 315; 49 U.S.C. 303(c), 1602(d), 1604(h), 1604(i), and 1610; 40 CFR Part 1500 *et seq.*; 49 CFR 1.48(b) and 1.51.

§ 771.101 Purpose.

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA) and the Urban Mass Transportation Administration (UMTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and the regulation of the Council on Environmental Quality (CEQ), 40 CFR Parts 1500–1508. This regulation sets forth all FHWA, UMTA, and Department of Transportation (DOT) requirements under NEPA for the processing of highway and urban mass transportation projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, and 49 U.S.C. 303, 1602(d), 1604(h), 1604(i), 1607a, 1607a–1 and 1610.

§ 771.103 [Reserved]

§ 771.105 Policy.

It is the policy of the Administration that:

(a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by this regulation.[1]

(b) Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals.

(c) Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions.

(d) Measures necessary to mitigate adverse impacts be incorporated into the action. Measures necessary to mitigate adverse impacts are eligible for Federal funding when the Administration determines that:

(1) The impacts for which the mitigation is proposed actually result from the Administration action; and

(2) The proposed mitigation represents a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measures. In making this determination, the Administration will consider, among other factors, the extent to which the proposed measures would assist in complying with a Federal statute, Executive Order, or Administration regulation or policy.

(e) Costs incurred by the applicant for the preparation of environmental documents requested by the Administration be eligible for Federal assistance.

(f) No person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administration program or procedural activity required by or developed pursuant to this regulation.

§ 771.107 Definitions.

The definitions contained in the CEQ regulation and in Titles 23 and 49 of the United States Code are applicable. In addition, the following definitions apply.

(a) *Environmental studies*—The investigations of potential environmental impacts to determine the environmental process to be followed and to assist in the preparation of the environmental document.

(b) *Action*—A highway or transit project proposed for FHWA or UMTA funding. It also includes activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(c) *Administration action*—The approval by FHWA or UMTA of the applicant's request for Federal funds for construction. It also includes approval of activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds.

(d) *Administration*—FHWA or UMTA, whichever is the designated lead agency for the proposed action.

(e) *Section 4(f)*—Refers to 49 U.S.C. 303 and 23 U.S.C. 138.[2]

§ 771.109 Applicability and responsibilities.

(a)(1) The provisions of this regulation and the CEQ regulation apply to actions where the Administration exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation.

(2) This regulation does not apply to, or alter approvals by the Administration made prior to the effective date of this regulation.

(3) Environmental documents accepted or prepared by the Administration after the effective date of this regulation shall be developed in accordance with this regulation.

(b) It shall be the responsibility of the applicant, in cooperation with the Administration to implement those mitigation measures stated as commitments in the environmental documents prepared pursuant to this regulation. The FHWA will assure that this is accomplished as a part of its program management responsibilities that include reviews of designs, plans, specifications, and estimates (PS&E), and construction inspections. The UMTA will assure implementation of committed mitigation measures through incorporation by reference in the grant agreement, followed by reviews of designs and contruction inspections.

(c) The Administration, in cooperation with the applicant, has the responsibility to manage the preparation of the appropriate environmental document. The role of the applicant will be determined by the Administration accordance with the CEQ regulation:

(1) *Statewide agency.* If the applicant is a public agency that has statewide jurisdiction (for example, a State highway agency or a State department of transportation) or is a local unit of government acting through a statewide agency, and meets the requirements of section 102(2)(D) of NEPA, the applicant may prepare the environmental impact statement (EIS) and other environmental documents with the Administration furnishing guidance, participating in the

[1] FHWA and UMTA have supplementary guidance on the format and content of NEPA documents for their programs. This includes a list of various environmental laws, regulations, and Executive Orders which may be applicable to projects. The FHWA Technical Advisory T6640.8A, October 30, 1987, and the UMTA supplementary guidance are available from the respective FHWA and UMTA headquarters and field offices as prescribed in 49 CFR Part 7, Appendices D and G.

[2] Section 4(f), which protected certain public lands and all historic sites, technically was repealed in 1983 when it was codified, without substantive change, as 49 U.S.C. 303. This regulation continues to refer to section 4(f) because it would create needless confusion to do otherwise; the policies section 4(f) engendered are widely referred to as "section 4(f)" matters. A provision with the same meaning is found at 23 U.S.C. 138 and applies only to FHWA actions.

preparation, and independently evaluating the document. All FHWA applicants qualify under this paragraph.

(2) *Joint lead agency.* If the applicant is a public agency and is subject to State or local requirements comparable to NEPA, then the Administration and the applicant may prepare the EIS and other environmental documents as joint lead agencies. The applicant shall initially develop substantive portions of the environmental document, although the Administration will be responsible for its scope and content.

(3) *Cooperating Agency.* Local public agenices with special expertise in the proposed action may be cooperating agencies in the preparation of an environmental document. An applicant for capital assistance under the Urban Mass Transportation Act of 1964, as amended (UMT Act), is presumed to be a cooperating agency if the conditions in paragraph (c) (1) or (2) of this section do not apply. During the environmental process, the Administration will determine the scope and content of the environmental document and will direct the applicant, acting as a cooperating agency, to develop information and prepare those portions of the document concerning which it has special expertise.

(4) *Other.* In all other cases, the role of the applicant is limited to providing environmental studies and commenting on environmental documents. All private institutions or firms are limited to this role.

§ 771.111 Early coordination, public involvement, and project development.

(a) Early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental document. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action and related environmental laws and requirements and of the need for specific studies and findings which would normally be developed concurrently with the environmental document.

(b) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action. For UMTA, this is normally no later than the review of the transportation improvement program (TIP) and for FHWA, the approval of the 105 program (23 U.S.C. 105).

(c) When FHWA and UMTA are involved in the development of joint projects, or when FHWA or UMTA acts as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis.

(d) During the early coordination process, the Administration, in cooperation with the applicant, may request other agencies having special interest or expertise to become cooperating agencies. Agencies with jurisdiction by law must be requested to become cooperating agencies.

(e) Other States, and Federal land management entities, that may be significantly affected by the action or by any of the alternatives shall be notified early and their views solicited by the applicant in cooperation with the Administration. The Administration will prepare a written evaluation of any significant unresolved issues and furnish it to the applicant for incorporation into the environmental assessment (EA) or draft EIS.

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major transportation actions, the tiering of EISs as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and areawide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures.

(h) For the Federal-aid highway program:

(1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 40 CFR Parts 1500–1508.

(2) State public involvement/public hearing procedures must provide for:

(i) Coordination of public involvement activities and public hearings with the entire NEPA process.

(ii) Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions.

(iii) One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for any Federal-aid project which requires significant amounts of right-of-way, substantially changes the layout or functions of connecting roadways or of the facility being improved, has a substantial adverse impact on abutting property, otherwise has a significant social, economic, environmental or other effect, or for which the FHWA determines that a public hearing is in the public interest.

(iv) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing. Such notice will indicate the availability of explanatory information. The notice shall also provide information required to comply with public involvement requirements of other laws, Executive Orders, and regulations.

(v) Explanation at the public hearing of the following information, as appropriate:

(A) The project's purpose, need, and consistency with the goals and objectives of any local urban planning.

(B) The project's alternatives, and major design features.

(C) The social, economic, environmental, and other impacts of the project.

(D) The relocation assistance program and the right-of-way acquisition process.

(E) The State highway agency's procedures for receiving both oral and written statements from the public.

(vi) Submission to the FHWA of a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered. The transcript will be accompanied by copies of all written statements from the public, both submitted at the public hearing or during an announced period after the public hearing.

(3) Based on the reevaluation of project environmental documents required by § 771.129, the FHWA and the State highway agency will determine whether changes in the project or new information warrant additional public involvement.

(4) Approvals or acceptances of public involvement/public hearing procedures prior to the publication date of this regulation remain valid.

(i) Applicants for capital assistance in the UMTA program achieve public participation on proposed projects by holding public hearings and seeking input from the public through the scoping process for environmental documents. For projects requiring EISs, a public hearing will be held during the circulation period of the draft EIS. For all other projects, an opportunity for public hearings will be afforded with adequate prior notice pursuant to 49 U.S.C. 1602(d), 1604(i), 1607a(f) and 1607a-1(d), and such hearings will be held when anyone with a significant social, economic, or environmental interest in the matter requests it. Any hearing on the action must be coordinated with the NEPA process to the fullest extent possible.

(j) Information on the UMTA environmental process may be obtained from: Director, Office of Planning Assistance, Urban Mass Transportation Administration, Washington, DC 20590. Information on the FHWA environmental process may be obtained from: Director, Office of Environmental Policy, Federal Highway Administration, Washington, DC 20590.

§ 771.113 Timing of Administration activities.

(a) The Administration in cooperation with the applicant will perform the work necessary to complete a FONSI or an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition (with the exception of hardship and protective buying, as defined in § 771.117(d)), purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed:

(1)(i) The action has been classified as a categorical exclusion (CE), or

(ii) A FONSI has been approved, or

(iii) A final EIS has been approved and available for the prescribed period of time and a record of decision has been signed;

(2) For actions proposed for FHWA funding, the FHWA Division Administrator has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;

(3) For activities proposed for FHWA funding, the programming requirements of 23 CFR Part 450, Subpart B, and 23 CFR Part 630, Subpart A, have been met.

(b) For FHWA, the completion of the requirements set forh in paragraph (a)(1) and (a)(2) of this section is considered acceptance of the general project location and concepts described in the environmental document unless otherwise specified by the approving official. However, such approval does not commit the Administration to approve any future grant request to fund the preferred alternative.

(c) Letters of Intent issued under the authority of section 3(a)(4) of the UMT Act are used by UMTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by UMTA until the NEPA process is completed.

§ 771.115 Classes of actions

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

(a) *Class I (EISs).* Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally required an EIS:

(1) A new controlled access freeway.

(2) A highway project of four or more lanes on a new location.

(3) New construction or extension of fixed rail transit facilities (e.g., rapid rail, light rail, commuter rail, automated guideway transit).

(4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.

(b) *Class II (CEs).* Actions that do not individually or cumulative have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in § 771.117(c). When appropriately documented, additional projects may also qualify as CEs pursuant to § 771.117(d).

(c) *Class III (EAs).* Actions in which the significance of the environmental impact is not clearly established. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

§ 771.117 Categorical exclusions.

(a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significnt environmental impacts. They are actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.

(b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the Administration, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

(1) Significant environmental impacts;

(2) Substantial controversy on environmental grounds;

(3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or

(4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

(c) The following actions meet the criteria for CEs in the CEQ regulation (section 1508.4) and § 771.117(a) of this regulation and normally do not require any further NEPA approvals by the Administration:

(1) Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 U.S.C. 307; approval of a unified work program and any findings required in the planning process pursuant to 23 U.S.C. 134; approval of statewide programs under 23 CFR Part 630; approval of project concepts under 23 CFR Part 476; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.

(2) Approval of utility installations along or across a transportation facility.

(3) Construction of bicycle and pedestrian lanes, paths, and facilities.

(4) Activities included in the State's "highway safety plan" under 23 U.S.C. 402.

(5) Transfer of Federal lands pursuant to 23 U.S.C. 317 when the subsequent action is not an FHWA action.

(6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.

(7) Landscaping.

(8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(9) Emergency repairs under 23 U.S.C. 125.

(10) Acquisition of scenic easements.

(11) Determination of payback under 23 CFR Part 480 for property previously acquired with Federal-aid participation.

(12) Improvements to existing rest areas and truck weigh stations.

(13) Ridesharing activities.

(14) Bus and rail car rehabilitation.

(15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

(16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand.

(17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(18) Track and railbed maintenance and improvements when carried out within the existing right-of-way.

(19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.

(20) Promulgation of rules, regulations, and directives. (d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

(1) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing).

(2) Highway safety or traffic operations improvement projects including the installation of ramp metering control devices and lighting.

(3) Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to replace existing at-grade railroad crossings.

(4) Transportation corridor fringe parking facilities.

(5) Construction of new truck weigh stations or rest areas.

(6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

(7) Approvals for changes in access control.

(8) Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

(9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.

(10) Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.

(11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.

(12) Acquisition of land for hardship or protective purposes; advance land acquisition loans under section 3(b) of the UMT Act.[3] Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

(e) Where a pattern emerges of granting CE status for a particular type of action, the Administration will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in paragraph (c) or (d) of this section, as appropriate.

§ 771.119 Environmental assessments.

(a) An EA shall be prepared by the applicant in consultation with the Administration for each action that is not a CE and does not clearly require the preparation of an EIS, or where the Administration believes an EA would assist in determining the need for an EIS.

(b) For actions that require an EA, the applicant, in consultation with the Administration, shall, at the earliest appropriate time, begin consultation with interested agencies and others to advise them of the scope of the project and to achieve the following objectives: determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures which might mitigate adverse environmental impacts; and identify other environmental review and consultation requirements which should be performed concurrently with the EA. The applicant shall accomplish this through an early coordination process (i.e., procedures under § 771.111) or through a scoping process. Public involvement shall be summarized and the results of agency coordination shall be included in the EA.

(c) The EA is subject to Administration approval before it is made available to the public as an Administration document. The UMTA applicants may circulate the EA prior to Administration approval provided that the document is clearly labeled as the applicant's document.

(d) The EA need not be circulated for comment but the document must be made available for public inspection at the applicant's office and at the appropriate Administration field offices in accordance with paragraphs (e) and (f) of this section. Notice of availability of the EA, briefly describing the action and its impacts, shall be sent by the

[3] Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

Protective acquisition is done to prevent imminent development of a parcel which is needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

applicant to the affected units of Federal, State and local government. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.

(e) When a public hearing is held as part of the application for Federal funds, the EA shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The notice of the public hearing in local newspapers shall announce the availability of the EA and where it may be obtained or reviewed. Comments shall be submitted in writing to the applicant or the Administration within 30 days of the availability of the EA unless the Administration determines, for good cause, that a different period is warranted. Public hearing requirements are as described in § 771.111.

(f) When a public hearing is not held, the applicant shall place a notice in a newspaper(s) similar to a public hearing notice and at a similar stage of development of the action, advising the public of the availability of the EA and where information concerning the action may be obtained. The notice shall invite comments from all interested parties. Comments shall be submitted in writing to the applicant or the Administration within 30 days of the publication of the notice unless the Administration determines, for good cause, that a different period is warranted.

(g) If no significant impacts are identified, the applicant shall furnish the administration a copy of the revised EA, as appropriate; the public hearing transcript, where applicable; copies of any comments received and responses thereto; and recommend a FONSI. The EA should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met.

(h) When the Administration expects to issue a FONSI for an action described in § 771.115(a), copies of the EA shall be made available for public review (including the affected units of government) for a minimum of 30 days before the Administration makes its final decision (See 40 CFR 1501.4(e)(2).) This public availability shall be announced by a notice similar to a public hearing notice.

(i) If, at any point in the EA process, the Administration determines that the action is likely to have a significant impact on the environment, the preparation of an EIS will be required.

§ 771.121 Findings of no significant impact.

(a) The Administration will review the EA and any public hearing comments and other comments received regarding the EA. If the Administration agrees with the applicant's recommendations pursuant to § 771.119(g), it will make a separate written FONSI incorporating by reference the EA and any other appropriate environmental documents.

(b) After a FONSI has been made by the Administration, a notice of availability of the FONSI shall be sent by the applicant to the affected units of Federal, State and local government and the document shall be available from the applicant and the Administration upon request by the public. Notice shall also be sent to the State intergovernmental review contacts established under Executive Order 12372.

(c) If another Federal agency has issued a FONSI on an action which includes an element proposed for Administration funding, the Administration will evaluate the other agency's FONSI. If the Administration determines that this element of the project and its environmental impacts have been adequately identified and assessed, and concurs in the decision to issue a FONSI, the Administration will issue its own FONSI incorporating the other agency's FONSI. If environmental issues have not been adequately identified and assessed, the Administration will require appropriate environmental studies.

§ 771.123 Draft environmental impact statements.

(a) A draft EIS shall be prepared when the Administration determines that the action is likely to cause significant impacts on the environment. When the decision has been made by the Administration to prepare an EIS, the Administration will issue a Notice of Intent (40 CFR 1508.22) for publication in the **Federal Register**. Applicants are encouraged to announce the intent to prepare an EIS by apprpriate means at the local level.

(b) After publication of the Notice of Intent, the Administration, in cooperation with the applicant, will begin a scoping process. The scoping process will be used to identify the range of alternatives and impacts and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. For FHWA, scoping is normally achieved through public and agency involvement procedures required by § 771.111. For UMTA, scoping is achieved by soliciting agency and public responses to the action by letter or by holding scoping meetings. If a scoping meeting is to be held, it should be announced in the Administration's Notice of Intent and by appropriate means at the local level.

(c) The draft EIS shall be prepared by the Administration in cooperation with the applicant or, where permitted by law, by the applicant with appropriate guidance and participation by the Administration. The draft EIS shall evaluate all reasonable alternatives to the action and discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The draft EIS shall also summarize the studies, reviews, consultations, and coordination required by environmental laws or Executive Orders to the extent appropriate at this stage in the environmental process.

(d) An applicant which is a "statewide agency" may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures. Where the applicant is a "joint lead" or "cooperating" agency, the applicant may select a consultant, after coordination with the Administration to assure compliance with 40 CFR 1506.5(c). The Administration will select any such consultant for "other" applicants. (See § 771.109(c) for definitions of these terms.)

(e) The Administration, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet.

(f) A lead, joint lead, or a cooperating agency shall be responsible for printing the EIS. The initial printing of the draft EIS shall be in sufficient quantity to meet requirements for copies which can reasonably be expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the draft EIS may be charged a fee which is: not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The draft EIS shall be circulated for comment by the applicant on behalf of the Administration. The draft EIS shall be made available to the public and transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 CFR 1506.9. The draft EIS shall be transmitted to:

(1) Public officials, interest groups, and members of the public known to have an interest in the proposed action or the draft EIS;

(2) Federal, State and local government agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the action. Copies shall be provided directly to appropriate State and local agencies, and to the State intergovernmental review contacts established under Executive Order 12372; and

(3) States and Federal land management entities which may be significantly affected by the proposed action or any of the alternatives. These copies shall be accompanied by a request that such State or entity advise the Administration in writing of any disagreement with the evaluation of impacts in the statement. The Administration will furnish the comments received to the applicant along with a written assessment of any disagreements for incorporation into the final EIS.

(h) The UMTA requires a public hearing during the circulation period of all draft EISs. FHWA public hearing requirements are as described in § 771.111(h). Whenever a public hearing is held, the draft EIS shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing on an action proposed for FHWA funding is not held, a notice shall be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(i) The Federal Register public availability notice (40 CFR 1506.10) shall establish a period of not less than 45 days for the return of comments on the draft EIS. The notice and the draft EIS transmittal letter shall identify where comments are to be sent.

(j) For UMTA funded major urban mass transportation investments, the applicant shall prepare a report identifying a locally preferred alternative at the conclusion of the Draft EIS circulation period. Approval may be given to begin preliminary engineering on the principal alternative(s) under consideration. During the course of such preliminary engineering, the applicant will refine project costs, effectiveness, and impact information with particular attention to alternative designs, operations, detailed location decisions and appropriate mitigation measures. These studies will be used to prepare the final EIS or, where appropriate, a supplemental draft EIS.

§ 771.125 Final environmental impact statements.

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the Administration in cooperation with the applicant or, where permitted by law, by the applicant with appropriate guidance and participation by the Administration. The final EIS shall identify the preferred alternative and evaluate all reasonable alternatives considered. It shall also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in § 771.109(b). The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met.

(2) Every reasonable effort shall be made to resolve interagency disagreements on actions before processing the final EIS. If significant issues remain unresolved, the final EIS shall identify those issues and the consultations and other efforts made to resolve them.

(b) The final EIS will be reviewed for legal sufficiency prior to Administration approval.

(c) The Administration will indicate approval of the EIS for an action by signing and dating the cover page. Final EISs prepared for actions in the following categories will be submitted to the Administration's Headquarters for prior concurrence:

(1) Any action for which the Administration determines that the final EIS should be reviewed at the Headquarters office. This would typically occur when the Headquarters office determines that (i) additional coordination with other Federal, State or local governmental agencies is needed; (ii) the social, economic, or environmental impacts of the action may need to be more fully explored; (iii) the impacts of the proposed action are unusually great; (iv) major issues remain unresolved; or (v) the action involves national policy issues.

(2) Any action to which a Federal, State or local government agency has indicated opposition on environmental grounds (which has not been resolved to the written satisfaction of the objecting agency).

(3) Major urban mass transportation investments as defined by UMTA's policy on major investments (49 FR 21284; May 18, 1984).

(d) The signature of the UMTA approving official on the cover sheet also indicates compliance with section 14 of the UMT Act and fulfillment of the grant application requirements of sections 3(d)(1) and (2), 5(h), and 5(i) of the UMT Act.

(e) Approval of the final EIS is not an Administration Action (as defined in § 771.107(c)) and does not commit the Administration to approve any future grant request to fund the preferred alternative.

(f) The initial printing of the final EIS shall be in sufficient quantity to meet the request for copies which can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the final EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The applicant shall also publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13 which implements Executive Order 12372. When filed with EPA, the final EIS shall be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate.

§ 771.127 Record of decision.

(a) The Administration will complete and sign a record of decision (ROD) no sooner than 30 days after publication of the final EIS notice in the Federal Register or 90 days after publication of a notice for the draft EIS, whichever is later. The ROD will present the basis for the decision as specified in 40 CFR 1505.2, summarize any mitigation measures that will be incorporated in the project and document any required section 4(f) approval in accordance with § 771.135(l). Until any required ROD has been signed, no further approvals may be given except for administrative

activities taken to secure further project funding and other activities consistent with 40 CFR 1506.1.

(b) If the Administration subsequently wishes to approve an alternative which was not identified as the preferred alternative but was fully evaluated in the final EIS, or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, a revised ROD shall be subject to review by those Administration offices which reviewed the final EIS under § 771.125(c). To the extent practicable the approved revised ROD shall be provided to all persons, organizations, and agencies that received a copy of the final EIS pursuant to § 771.125(g).

§ 771.129 Re-evaluations.

(a) A written evaluation of the draft EIS shall be prepared by the applicant in cooperation with the Administration if an acceptable final EIS is not submitted to the Administration within 3 years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether a supplement to the draft EIS or a new draft EIS is needed.

(b) A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.

(c) After approval of the EIS, FONSI, or CE designation, the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

§ 771.130 Supplemental environmental impact statements.

(a) A draft EIS, final EIS, or supplemental EIS may be supplemented at any time. An EIS shall be supplemented whenever the Administration determines that:

(1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or

(2) New information or circumstances relevant to environmental concerns and bearings on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.

(b) However, a supplemental EIS will not be necessary where:

(1) The changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS; or

(2) The Administration decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a revised ROD shall be prepared and circulated in accordance with § 771.127(b).

(c) Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances. If, based upon the studies, the Administration determines that a supplemental EIS is not necessary, the Administration shall so indicate in the project file.

(d) A supplement is to be developed using the same process and format (i.e., draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required.

(e) A supplemental draft EIS may be necessary for UMTA major urban mass transportation investments if there is a substantial change in the level of detail on project impacts during project planning and development. The supplement will address site-specific impacts and refined cost estimates that have been developed since the original draft EIS.

(f) In some cases, a supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental EIS shall not necessarily:

(i) Prevent the granting of new approvals;

(ii) Require the withdrawal of previous approvals; or

(iii) Require the suspension of project activities; for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a reassessment of the entire action, or more than a limited portion of the overall action, the Administration shall suspend any activities which would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental EIS is completed.

§ 771.131 Emergency action procedures.

Requests for deviations from the procedures in this regulation because of emergency circumstances (40 CFR 1506.11) shall be referred to the Administration's headquarters for evaluation and decision after consultation with CEQ.

§ 771.133 Compliance with other requirements.

The final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive Orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein. The FHWA approval of the appropriate NEPA document will constitute its finding of compliance with the report requirements of 23 U.S.C. 128.

§ 771.135 Section 4(f) (49 U.S.C. 303).

(a)(l) The Administration may not approve the use of land from a significant publicly owned public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site unless a determination is made that:

(i) There is no feasible and prudent alternative to the use of land from the property; and

(ii) The action includes all possible planning to minimize harm to the property resulting from such use.

(2) Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

(b) The Administration will determine the application of section 4(f). Any use of lands from a section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study.

(c) Consideration under section 4(f) is not required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire site is not

significant. In the absence of such a determination, the section 4(f) land will be presumed to be significant. The Administration will review the significance determination to assure its reasonableness.

(d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses, and, in fact, are managed for multiple uses, section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl purposes. The determination as to which lands so function or are so designated, and the significance of those lands, shall be made by the officials having jurisdiction over the lands. The Administration will review this determination to assure its reasonableness. The determination of significance shall apply to the entire area of such park, recreation, or wildlife and waterfowl refuge sites.

(e) In determining the application of section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify all properties on or eligible for the National Register of Historic Places (National Register). The section 4(f) requirements apply only to sites on or eligible for the National Register unless the Administration determines that the application of section 4(f) is otherwise appropriate.

(f) The Administration may determine that section 4(f) requirements do not apply to restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

(1) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, and

(2) The SHPO and the Advisory Council on Historic Preservation (ACHP) have been consulted and have not objected to the Administration finding in paragraph (f)(1) of this section.

(g)(1) Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction except as set forth in paragraph (g)(2) of this section. Where section 4(f) applies to archeological sites discovered during construction, the section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made. The review process including the consultation with other agencies, may be shortened as appropriate.

(2) Section 4(f) does not apply to archeological sites where the Administration, after consultation with the SHPO and the ACHP, determines that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken or where the Administration decides, with agreement of the SHPO and, where applicable, the ACHP not to recover the resource.

(h) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites are sometimes made and determinations of significance changed late in the development of a proposed action. With the exception of the treatment of archeological resources in paragraph (g) of this section, the Administration may permit a project to proceed without consideration under section 4(f) if the property interest in the section 4(f) lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by section 4(f) prior to acquisition.

(i) The evaluations of alternatives to avoid the use of section 4(f) land and of possible measures to minimize harm to such lands shall be developed by the applicant in cooperation with the Administration. This information should be presented in the draft EIS, EA, or, for a project classified as a CE in a separate document. The section 4(f) evaluation shall be provided for coordination and comment to the officials having jurisdiction over the section 4(f) property and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. A minimum of 45 days shall be established by the Administration for receipt of comments. Uses of section 4(f) land covered by a programmatic section 4(f) evaluation shall be documented and coordinated as specified in the programmatic section 4(f) evaluation.

(j) When adequate support exists for a section 4(f) determination, the discussion in the final EIS, FONSI, or separate section 4(f) evaluation shall specifically address:

(1) The reasons why the alternatives to avoid a section 4(f) property are not feasible and prudent; and

(2) All measures which will be taken to minimize harm to the section 4(f) property.

(k) The final Section 4(f) evaluation will be reviewed for legal sufficiency.

(l) For actions processed with EISs, the Administration will make the section 4(f) approval either in its approval of the final EIS or in the ROD. Where the section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its section 4(f) approval in the ROD. Actions requiring the use of section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notified by the Administration of section 4(f) approval. For these actions, any required section 4(f) approval will be documented separately.

(m) Circulation of a separate section 4(f) evaluation will be required when:

(1) A proposed modification of the alignment or design would require the use of section 4(f) property after the CE, FONSI, draft EIS, or final EIS has been processed; or

(2) The Administration determines, after processing the CE, FONSI, draft EIS, or final EIS that section 4(f) applies to a property;

(3) A proposed modification of the alignment, design, or measures to minimize harm (after the original section 4(f) approval) would result in a substantial increase in the amount of section 4(f) land used, a substantial increase in the adverse impacts to section 4(f) land, or a substantial reduction in mitigation measures; or

(4) Another agency is the lead agency for the NEPA process, unless another DOT element is preparing the section 4(f) evaluation.

(n) If the Administration determines under section 771.135(m) or otherwise, that section 4(f) is applicable after the CE, FONSI, or final EIS has been processed, the decision to prepare and circulate a section 4(f) evaluation will not necessarily require the preparation of a new or supplemental environmental document. Where a separately circulated section 4(f) evaluation is prepared, such evaluation does not necessarily:

(i) Prevent the granting of new approvals;

(ii) Require the withdrawal of previous approvals; or

(iii) Require the suspension of project activities; for any activity not affected by the section 4(f) evaluation.

(o) An analysis required by section 4(f) may involve different levels of detail where the section 4(f) involvement is addressed in a tiered EIS.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the section 4(f) evaluation may not be available at that stage in the development of the action. In such cases, an evaluation should be made on the potential impacts that a proposed action will have on section 4(f) land and whether those impacts could have a bearing on the decision to be made. A preliminary determination may be made at this time as to whether there are feasible and prudent locations or alternatives for the action to avoid the use of section 4(f) land. This preliminary determination shall consider all possible planning to minimize harm to the extent that the level of detail available at the first-tier EIS stage allows. It is recognized that such planning at this stage will normally be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first-tier stage. This preliminary determination is then incorporated into the first-tier EIS.

(2) A section 4(f) approval made when additional design details are available will include a determination that:

(i) The preliminary section 4(f) determination made pursuant to paragraph (o)(1) of this section is still valid; and

(ii) The criteria of paragraph (a) of this section have been met.

§ 771.137 International actions.

(a) The requirements of this part apply to:

(1) Administration actions significantly affecting the environment of a foreign nation not participating in the action or not otherwise involved in the action.

(2) Administration actions outside the U.S., its territories, and possessions which significantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign government concerning environmental studies or documentation is anticipated, the Administration shall coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

Due to the revision of 23 CFR Part 771, the following technical amendments are necessary to correct references and certain phrases found in Parts 640 and 712. These technical amendments are effective on the same date as the rule for Part 771.

PART 640—[AMENDED]

§ 640.107 [Amended]

3. In § 640.107, paragraph (d) is amended by removing the words "a nonmajor action" and "23 CFR 771.9" and inserting in their place "categorical exclusions" and "23 CFR Part 771" respectively.

PART 712—[AMENDED]

§ 712.204 [Amended]

4. In § 712.204, paragraph (c)(1) is amended by removing the words "negative declaration" and inserting in their place "environmental assessment;" paragraph (c)(3)(ii) is amended by removing the reference "§ 771.5" and the words "negative declarations" and inserting in their place "23 CFR Part 771" and "findings of no significant impact," respectively; and paragraph (c)(3)(iii) is amended by removing the reference "§ 771.19" and the word "statements" and inserting in their place "23 CFR Part 771" and "evaluations," respectively.

PART 790—[REMOVED]

5. Part 790, Public Hearings and Location/Design Approval is removed from Chapter I of 23 CFR, effective one year after publication in the **Federal Register.**

Due to the rescission of 23 CFR Part 790, the following technical amendments are necessary to correct references found in other parts of Title 23, Code of Federal Regulations, as set forth below. These technical amendments are effective on the same date as the rescission of 23 CFR Part 790.

PART 635—[AMENDED]

§ 635.309 [Amended]

6. In § 635.309, paragraph (d) is amended by removing "has satisfied the requirements of 23 CFR Part 790 where applicable or, under alternate procedures which have been accepted by FHWA" and inserting in its place "in accord with 23 CFR 771.111(h)."

PART 650—[AMENDED]

§ 650.109 [Removed]

7. Part 650, Subpart A, is amended by removing § 650.109, Public Involvement, in its entirety.

PART 712—[AMENDED]

§ 712.204 [Amended]

8. In § 712.204, paragraphs (c)(3) (iii) and (iv) are amended by removing, "and" and inserting a period at the end of paragraph (c)(3)(iii), and removing paragraph (c)(3)(iv) entirely.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Urban Mass Transportation Administration

23 CFR Part 771

[FHWA Docket No. 89-17]

RIN 2125-AC18

Environmental Impact and Related Procedures; Constructive Use

AGENCIES: Federal Highway Administration (FHWA) and Urban Mass Transportation Administration (UMTA), Department of Transportation.

ACTION: Final rule.

SUMMARY: The FHWA and the UMTA are amending their joint regulation on section 4(f) of the Department of Transportation Act to define "use" and to more clearly establish the circumstances under which a "constructive use" of certain protected resources would or would not occur. The amendment also sets forth the procedures pursuant to which such determinations are made. The protected resources include publicly owned public parks, recreation areas, wildlife and waterfowl refuges, and historic sites of national, State or local significance.

EFFECTIVE DATE: May 1, 1991.

FOR FURTHER INFORMATION CONTACT: For FHWA, Mr. Ken Perret, Office of Environment and Planning, (202) 366–4093, or Mr. L. Harold Aikens, Jr., Office of the Chief Counsel, (202) 366–0791, Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays. For UMTA, Mr. Abbe Marner, (202) 366–0096, or Scott Biehl, Office of the Chief Counsel, (202) 366–4063, Urban Mass Transportation Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 8:30 a.m. to 5 p.m. e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Background

The FHWA and the UMTA (hereafter referred to as "the Administration") are issuing a final rule amending their regulation implementing Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303 and 23 U.S.C. 138 (referred to hereafter as "Section 4(f)") to define "use" of land and to more clearly establish the circumstances under which a constructive use of certain protected resources would or would not occur. This amendment is in furtherance of the policy of the Administration "that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. 303(a).

Section 4(f) permits the use of land for a transportation project from a significant publicly owned public park, recreational area, wildlife or waterfowl refuge, or any significant historic site only when the Administration has determined that (1) There is no feasible and prudent alternative to such use, and (2) the project includes all possible planning to minimize harm to the property resulting from such use. Thus, the purpose of Section 4(f) is to preserve parkland, recreation areas, refuges, and historic sites by limiting the circumstances under which such land can be used for transportation programs or projects.

The two part test mentioned above is predominantly applicable where there is a permanent use of land. There are instances where there is a temporary use of such land. Generally, this occurs when a construction easement is required in order to complete the project. There is no use under Section 4(f) if there is a temporary occupancy of land involving minor work that is not adverse in terms of the statute's preservationist purposes, and the site is returned to the same or better condition. The statute's purpose is met where no land is permanently incorporated in a transportation project and it is not permanently diminished in value.

The meaning of the term "use" has been gradually expanded by a number of court decisions to include the concept of "constructive use." Thus, when applied to transportation projects constructed near Section 4(f) resources, a constructive use may occur when impacts due to proximity of the project substantially impair the activities, features, or attributes of the resource.

The current regulation on Section 4(f) addressed use only indirectly by setting forth several situations where Section 4(f) does not apply, even where there is some physical taking of land, e.g., archeological sites which are not important for preservation in place. Those provisions arose from judicial decisions which held it possible for a physical occupancy of land that is not adverse in terms of the Section 4(f) statute's preservationist purposes to not result in a use. No definition of "use" or "constructive use" exists in the current regulation.

Divergent and contradictory views relating to specific projects have been expressed by the courts, government agencies, special interest groups, and the public on what types and amount of impacts create a constructive use. The Administration believes that these differing views have been due, in part, to the lack of a clear definition of constructive use and of specific guidance to affected agencies and the public. By this rule, which defines "use" of a Section 4(f) resource to include "constructive use," and establishes circumstances under which the latter would or would not occur, the Administration has set forth a procedure to assure future consistency in determining when a constructive use occurs.

Description

The final rule concerns rules of practice and procedure for use by the Administration, State and local transportation agencies, and other affected parties in conjunction with determinations made under Section 4(f) and contains recommended criteria for determining when a constructive use would or would not occur. This rule does not mark a major departure from existing Administration practice or interpretation of "use" or "constructive use." Instead, the rule largely reflects the current policy of the Administration and is designed to establish consistent guidance as to these matters. Of course, some changes were made in response to the comments received. These changes are noted in this preamble. Also, this rule creates a process for making determinations of constructive use (or no constructive use), which draws on procedures applied previously on an ad hoc basis.

Public Comments

On February 2, 1990, the Administration published in the Federal Register (55 FR 3599–3603, Docket 89–17) a Notice of Proposed Rulemaking (NPRM) on this subject. On April 3, 1990, when Docket No. 89–17 closed, the Administration had received 24 comments. An additional 9 comments were received shortly thereafter. Of the 33 comments received, 15 respondents expressed support for the proposed rulemaking and 8 respondents expressed opposition or urged substantial changes to the proposed rulemaking. Ten respondents had no clear expression of support or opposition. Almost all commenters offered technical comments and proposed revisions to one or more paragraphs. All issues raised by these respondents were considered in promulgating the final rule, including those received after the closing date, April 3, 1990.

General comments supporting the rule stated that it clarified for State agencies the application of Section 4(f) to particular projects. A representative comment was made by the Oklahoma Department of Transportation: "The proposed rules are a positive effort in defining 'constructive use' and in providing guidance when Section 4(f) properties are potentially affected by proposed transportation projects." The California Department of Transportation commented: "We strongly support the proposed revisions. We believe that the rulemaking will provide consistency in determining when a constructive use occurs." Another commenter stated:

"The Maryland State Highway Administration supports the proposed amendments and believes they will offer a reasonable set of standards to determine the applicability of constructive 4(f) criteria."

Some of the general comments opposing the proposed rule questioned whether the proposed rule represented a retreat from the statutory purposes of Section 4(f) and would have an adverse impact upon public parks and historical properties. For example, the National Association for Olmsted Parks commented: "[T]he basic intent of the proposed regulations, which substantially cut back on the existing constructive use doctrine, will leave our urban parks in serious jeopardy and is therefore a premise that the National Association for Olmsted Parks *strongly opposes*." (Emphasis in original.) Similarly, the National Trust for Historic Preservation ("National Trust") commented: "In our view, however, these proposed regulations represent an improper attempt to impose substantial restrictions on the constructive use doctrine and to reverse a solid body of existing case law."

As stated in the NPRM, it continues to be the policy of the Administration that special effort should be made to preserve the natural beauty and use of public park and recreation lands, wildlife and waterfowl refuges, and historic sites. It is also important to note that Section 4(f) does not prohibit the use of such lands, but rather places limitations upon such use. The rule, as several respondents noted, provides guidance to the States and other agencies on those limitations.

Nor does the rule seek to alter the purposes of the statute by reversing "a solid body of case law." Several courts have expressed different views on the extent of the application of Section 4(f) to transportation projects and have provided inconsistent interpretation. The Administration also believes that a few court decisions have been misapplied Section 4(f). However, the focus of the rule is upon: (1) Providing future guidance to the States and other agencies charged with the day-to-day implementation of the statute; and (2) providing for consistency in that implementation across the country.

Although several of the opposing commenters urged that the Administration withdraw the proposed rulemaking or issue only "technical guidance" instead, they still recognized that clarification of the doctrine of "constructive use" and guidance from the Administration would be helpful. For example, the National Trust commented: "In general, the National Trust endorses the goal of codifying the constructive use doctrine in regulations, and has long recognized the need for more specific guidance on this issue to agency staff and to the states." The National Association for Olmsted Parks also commented: "In general, the National Association for Olmsted Parks endorses the goal of codifying the constructive use doctrine in regulations. We feel that there is a need for more specific guidance on this important issue."

Significantly, almost all respondents suggested some revisions to the proposed rule and provided specific examples. Thus, the position that the subject of "constructive use" is appropriate for rulemaking at this time, and that such a rulemaking can have beneficial purposes, is justified and shared by the Administration with almost all of the respondents.

Issues raised by the respondents focused upon all aspects of the proposed rule and, as noted, specific revisions were often proposed. These specific comments by the respondents are addressed below.

"Inconvenience" to the Property Owner

Three commenters referenced a phrase in the preamble of the NPRM which referred to "an annoyance or inconvenience that the property owner must suffer as one of the costs of present day civilization." 55 FR 3600 (1990). One State transportation agency felt that this phrasing "trivialized" the nature of proximity impacts and should be deleted. One State historical agency felt that the preamble implied that "property owners must suffer due to the cost of civilization," and it disagreed with this assertion. Finally, a State conservation agency stated that disturbances to Section 4(f) resources are not a "necessary consequence of present day civilization."

The phrase at issue was used in discussing property law concepts from older cases. The entire sentence, as stated in the preamble of the proposed rule, provides: "*The issue in these cases is* whether the proximity impacts constitute an infringement of a legally protected right, as opposed to an annoyance or inconvenience that the property owner must suffer as one of the costs of present day civilization." (Emphasis added.) And as further noted in that preamble, the question of constructive use with regard to Section 4(f) is on the "vitality of the activities, features, or attributes" of the resource itself, and not upon "broader, often irrelevant, concepts of property damage." Any inconvenience to property owners resulting from ordinary, present day disturbances, from whatever source, is not relevant to Section 4(f) or the guidance provided by the Administration in this rule.

Indeed, except to the extent that protected lands (other than historic sites) must be publicly owned, the term "property owner" is generally irrelevant to section 4(f). Consultation and coordination by the Administration is with the "Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or historic site," and the focus of Section 4(f) is upon the benefit of such lands to the public.

Activities, Features, or Attributes of a Resource

The National Trust for Historic Preservation objected to the alleged "segmentation" and "fragmentation" of the character of historic sites into "activities, features or attributes," as that phrase was used throughout the proposed rule. A State historical commission made a similar comment. As stated by the National Trust: "There is no legal basis for such an interpretation, which appears to be particularly targeted at historic sites." As an alternative, the National Trust suggested that regulations of the Advisory Council on Historic Preservation be used, and that the focus be placed upon the "character" or "setting" of the property, as opposed to its features. The Illinois Department of Conservation believes that "the impacts of transportation projects cannot be broken down into individual actions that affect only one portion of a 4(f) property." Another public interest organization commented that the words "activities, features, and attributes" were too subjective and would lead only to further litigation. The U.S. Department of the Interior also did not agree with the "segmentation" of resources, believing that "constructive use should be defined as a dynamic and complex process involving variable site-specific impact thresholds."

By contrast, a State transportation department believed that the words "activities, features or attributes that qualify a resource for protection" worked well for historic structures, but were inappropriate for public parks which do not have "qualifying features." A consultant stated that "substantial impairment" to historic properties should be explicitly linked to those features or attributes of a property which make it eligible for listing in the "National Register." Another State transportation department stated that substantial impairment "must be clearly tied to the effect on the activities,

features, or attributes that are the basis for the significance of a Section 4(f) resource" and the reference to "utility of the resource in terms of its prior significance" does not sufficiently provide the needed clarification.

The Administration believes that with regard to historic sites, Section 4(f) status is provided initially for the attributes which make that site significant as determined by the official with jurisdiction. The Administration recognizes, however, that other prevailing uses of the site by the public may develop over time, that such uses are often ones intended to be protected by Section 4(f), and that these changes in use will be considered. The use of the disjunctive "or" means that one or more of the terms "activities," "features," and "attributes" should be applicable to the protected resource, whether it is a park, refuge, or historic site. In some instances, such activities, features, or attributes will be closely related to the setting of the historic site; in other instances, they will not. The final rule is consistent with the statute.

Not all proximity impacts on historic sites (particularly privately owned sites) would constitute a constructive use. For example, the commercial use of an architecturally significant historic site, e.g., as an office building, would not be considered noise sensitive for purposes of constructive use. However, the building structure itself could be sensitive to visual impacts and thus subject to constructive use. Nor should too strict or too broad interpretations apply to public parks. Not all features of a public park would be susceptible to constructive use—for example, where a potential noise impact may only affect a parking lot for automobiles, but no other area of the park.

It should also be remembered that the essential purpose of the rule is to provide guidance to Administration and State and local transportation officials in the evaluation of "impacts" on a Section 4(f) resource. As noted, not all impacts should invoke the protection of Section 4(f). Rather, the Administration must look to the purposes for which the resource is of value to the public and the public uses of the resource, i.e., its activities, features, or attributes. Focusing upon such specific items, and upon specific impacts, will aid the Administration and other governmental agencies in their assessment of a transportation project's impact upon the Section 4(f) resource.

The Administration recognizes, as suggested by the Department of the Interior, that many Section 4(f) lands were "set aside for general, rather than specific purposes * * *" For example, the original nomination statements for a historic site may currently be irrelevant to impacts upon its present use. Constructive use determinations should consider the present uses of the resource by the public.

Officials having jurisdiction over the Section 4(f) resource should delineate key activities, features, and attributes to aid the analytical process.

Thus, as clarified herein, the determination of a constructive use of a Section 4(f) resource is a four-step analytical process: First, is the site a "protected resource" under Section 4(f), i.e., is it a publicly owned public park, recreation area, wildlife or waterfowl refuge, or an historic site of local, State or national significance? Second, what do the officials having jurisdiction consider the current and primary activities, features, or attributes of the Section 4(f) resource? Third, are these current and primary activities, features, or attributes of any type that would qualify for protection under Section 4(f)? Fourth, will the transportation project cause a substantial impairment to any of those current, primary and protected activities, features or attributes? Although this four-step analysis will be undertaken, to the extent it reasonably can, in consultation with the Federal, State, or local official having jurisdiction over the resource, the responsibility for this analysis and the determination of whether a constructive use actually would occur rests with the Administration. Thus, for example, if the official having jurisdiction fails to address the current activities, features or attributes of the Section 4(f) resource, it will be up to the Administration to do so.

The National Register of Historic Places

Two commenters felt that the emphasis in the proposed rule upon the placement of a site on the National Register of Historic Places was inappropriate, particularly in view of the limited nature of older nomination forms. The National Conference of State Historic Preservation Officers stated that the description listed in a National Register nomination form should not control the determination of the activities, features, or attributes of an historic site, because the description in the nomination form may be too limited. They felt that eligibility for the National Register was merely a "threshold" procedure, and that it is important not to rely solely on the characteristics and values listed in the nomination. Although we agree with the National Conference of State Historic Preservation Officers, we will continue to review the nomination forms as one source of information regarding the values of a site.

The National Trust for Historic Preservation commented that "on or eligible for the National Register of Historic Places," as stated in the preamble of the proposed rule, is an inappropriate limitation for Section 4(f) historic sites since the statute applies to any historic site deemed significant by local, State, or Federal officials. The applicability of Section 4(f) to historic resources is addressed at 23 CFR 771.135(e). Reference to the National Register as the primary means of determining historic significance has been part of the Administration's environmental review procedures since 1980. The reference to the National Register of Historic Places in the preamble and in § 771.135(p)(4)(vi) of the proposed rule did not provide a limiting definition of "historic site" for Section 4(f) application. However, in the Administration's experience, practically all the historic sites afforded Section 4(f) protection are either on or eligible for the National Register.

The preamble also noted that eligibility normally requires a site to be at least 50 years old. The preamble then noted the Administration's intention to expand the 50 year criterion of the National Register to include sites which would reach that age prior to actual construction of the transportation project. The Administration continues to recognize that there may be historical sites to which Section 4(f) would apply which are not listed or eligible for listing on the National Register, but are nonetheless historically significant when so identified by the Federal, State, or local official having jurisdiction. See, § 771.135(e).

Definitions of "Use" and "Constructive Use"

Section 771.135(p)(1) of the proposed rule defined "use," as set forth in Section 4(f). It included the words "temporary occupancy that is adverse in terms of the statute's preservationist purposes" in § 771.135(p)(1)(ii). The U.S. Department of the Interior and a State transportation department commented that use of the words "in terms of the statute's preservationist purposes" in § 771.135(p)(1)(ii) was inappropriate, the Department of the Interior believing that it was "too ambiguous" and would lead to numerous interpretations.

The intent of § 771.135(p)(1)(ii) is to provide guidance where none previous existed regarding certain minimal, temporary uses of land (such as right of entry and construction easements), which would not be subject to the

application of Section 4(f). Some construction-related activities taking place on land included in a Section 4(f) resource may be so minor in scope and duration that the preservation of parks and historic sites would not be impeded. Using publicly owned lands for construction easements can result in less disruption to the surrounding community and often may result in enhancement of the protected resource, such as minor regrading, landscaping, or other improvements. The Administration believes that an exclusion from Section 4(f) for certain temporary nonadverse occupancy of land, with the agreement of the officials having jurisdiction, is appropriate.

Obviously, several factors may be considered in determining whether a temporary occupancy of land is so minimal as to not constitute a use within the meaning of Section 4(f). The rule has been expanded in § 771.135(p)(7) to explain temporary occupancy of land as follows: (1) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land; (2) scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) resource are minimal; (3) there are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis; (4) the land being used must be fully restored, i.e., the resource must be returned to a condition which is at least as good as that which existed prior to the project; and (5) there must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

Section 771.135(p)(2) of the proposed rule provided, in part: "Constructive use occurs when the transportation project does not incorporate land from a Section 4(f) resource but the project's impacts due to proximity are so severe that the activities, features, or attributes that qualify a resource for protection under Section 4(f) are substantially impaired. Substantial impairment would only occur when the utility of the resource in terms of its prior significance is substantially diminished or destroyed, amounting to an indirect taking of such activities, features or attributes." (Emphasis added.) Only one commenter, a State transportation department, suggested that there can be no substantial impairment unless the significance of the resource is diminished or destroyed to such an extent that it amounted to an indirect taking. The U.S. Department of the Interior commented that the reference to "indirect taking" was inappropriate and the cause of several adverse comments to other sections of the proposed rule. Another commenter stated that the "indirect taking" standard is improper and inappropriate. One commenter believes the language defining constructive use is too limiting and narrow. The National Trust commented that the emphasized words above, in effect, negated the words "substantially diminished" and imposed destruction of the use as the only test for substantial impairment. Such an interpretation was not the intent of the proposed rule by the Administration. If an attribute of a resource is "destroyed," then it has obviously been "diminished." However, a substantial impairment may also exist which is less than destruction. In response to the above comments, and in connection with the discussion contained under the heading "Activities, Features, or Attributes of a Resource" above, that part of § 771.135(p)(2) in this final rule states: "Substantial impairment would occur only when the protected activities, features, or attributes of the resource are substantially diminished."

Determination of Constructive Use

The Transportation Cabinet of the State of Kentucky generally supported the proposed rule, but suggested that in § 771.135(p)(3), guidance should be provided as to when constructive use determinations "must" be made. Georgia DOT wanted to replace the second sentence of § 771.135(p)(3) with a slightly modified version of paragraph (p)(6) of that Section. A difficulty in this area arises, however, with the variety of possible instances as to when a constructive use might exist and the identification of all such instances when a determination should be made that there is no constructive use. The Administration would like to maintain the discretion to not make a determination. The Colorado Department of Highways felt that, where there has been consultation with the State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation (ACHP) under Section 106 of the National Historic Preservation Act which has resulted in acceptable protection for affected resources, further analysis under Section 4(f) would result in an unnecessary burden. Although the Administration coordinates the Section 106 and Section 4(f) processes as much as possible, the two statutes are substantively different and require distinct determinations. At this time § 771.135(p)(3) is adopted as proposed.

As a matter of general guidance to Federal, State and local agency officials to aid in the application of section 4(f) to transportation improvement projects, the Administration notes that a determination under § 771.135(p)(6) should normally be made when: (A) The proposed transportation project is adjacent to the section 4(f) resource; or (B) a Federal, State or local official with jurisdiction over a section 4(f) resource alleges that the transportation project may constitute a constructive use of that resource; or (C) there is an "adverse effect" determination under section 106 after consultation with the SHPO and the ACHP. The Administration also intends to issue further guidance in this area.

When a Constructive Use Would Occur

In proposed § 771.135(p)(4) the Administration set forth four examples of situations where a constructive use would be deemed to occur, relating to noise, visual, access, and vibration impacts. The Pennsylvania Department of Transportation commented that such examples should be deleted. It believed that parties would attempt to determine if specific project situations "fit the example(s) given." The Georgia Department of Transportation commented that paragraphs (p)(4) and (5) of § 771.135 could be condensed. It stated: "It is understood why examples have been included; however, this level of detail is usually found in a technical advisory. We believe it would be sufficient to list the types of indirect or secondary effects (air, noise, access, visual, economic, seismic, etc.) which when substantial may constitute a constructive use." The National Trust commented that, while the use of "examples in the regulations would provide helpful guidance to highway officials and courts," the specific examples listed in paragraph (p)(4) suggested a "threshold" for substantial impairment that "is far too high." And, the U.S. Department of the Interior commented that the use of some examples was helpful, but that the list of examples was not complete and "other impacts" could exist. Numerous commenters also responded favorably to the inclusion of examples in the rule.

The Administration continues to believe that the use of specific examples in the rule itself assists in providing necessary guidance to State and local transportation officials and others. The stated examples do not represent a "threshold" of substantial impairment, but rather represent examples of when a

constructive use would occur. Past experience indicates that these types of impacts are involved in the great majority of constructive use situations.

The four examples listed in the proposed rule do not constitute the only impacts that could occur. Other impacts may also constitute substantial impairment (and therefore become a constructive use). Also, it is possible that a particular fact situation which appear similar to a listed example may not, in fact, constitute a constructive use. Such determinations are strongly dependent upon the particular facts and circumstances of specific projects and specific resources.

Noise Level Increase as Substantial Impairment

One of the primary environmental impacts involved in the assessment of constructive use is the noise predicted to occur from a transportation project. The proposed rule noted that objective technical analysis can aid in the determination of whether a noise level increase due to the project will substantially impair the activities, features, or attributes that qualify an area or site for protection under section 4(f). Noise was addressed in the context of constructive use in two sections of the proposed rule, one covering situations where a constructive use would occur and the other covering situations where it would not occur.

Section 771.135(p)(4)(i) of the proposed rule gave several examples of noise-sensitive resources protected by section 4(f) which could be substantially impaired by excessive noise. The National Trust commented that the examples used in § 771.135(p)(4)(i) were too restrictive, particularly for historic sites "where a quiet setting is a major contributing factor to the historic significance," and urban parks "where serenity and quiet are of extraordinary significance." Similar comments about the too narrow application to parks and historic sites were made by the National Association for Olmsted Parks, the Massachusetts Metropolitan District Commission, Massachusetts Historical Commission, and others.

The Administration continues to believe that in order for predicted project-related noise to substantially impair a section 4(f) resource, the resource must derive some of its value and use from a relatively quiet setting. Thus, the examples in § 771.135(p)(4)(i) deal with types of resources which are in some degree "noise-sensitive." Clearly this is the case with performances at an outdoor amphitheater or the sleeping areas of a campground in a public park. With regard to historic sites and urban parks included in this example, the wording has been changed to make the provision somewhat broader while still recognizing that the resource must have some type of noise-sensitive activity or use in order for substantial interference due to noise to occur. In response to the above comments, language in this paragraph of the final rule now states in part that a constructive use would occur if: "The projected noise level increase attributable to the project would substantially interfere with the use and enjoyment * * * of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance, or enjoyment of an urban park where serenity and quiet are significant attributes."

Visual Intrusion as Substantial Impairment

Proposed § 771.135(p)(4)(ii) provided an example of constructive use due to visual intrusion. Substantial impairment on the basis of visual impact is a more subjective determination than is the case in the assessment of noise. Nevertheless, an example of visual intrusion was included because close proximity of a proposed transportation project can, under certain circumstances, substantially impair visually sensitive features or attributes of a park or historic site. It should be noted, though, that in order for constructive use on the basis of visual impact to occur, the resource must possess significant esthetic or visual qualities.

A comment was received from the Massachusetts Metropolitan District Commission which stated that "any diminishment" of the quality of a visually sensitive feature should constitute a constructive use and invoke the protection of Section 4(f). The Administration declines to adopt this view because "any diminishment" of values cannot be equated with substantial impairment. As noted in the preamble to the proposed rule, "a constructive use does not arise merely because a transportation improvement can be seen from the protected resource." (55 FR 3801 (1990)). The visual impact must be more substantial, such as when a proposed facility would dominate the immediate surroundings, interfering with primary views of or from the resource.

The Massachusetts Historical Commission expressed concern over potential damage to historic properties from transportation projects which introduce elements out of character with historic properties and their settings. Without mentioning visual impacts specifically, the National Trust was also concerned about potential impacts which would alter the character of a historic property's setting "when that character contributes to the property's qualification for the National Register [of Historic Places]." The Administration recognizes that the setting of a historic site or park can be an important aspect of the site worthy of protection, although this is certainly not always the case. This is something that will have to be considered in individual cases where projects are proposed to be located close to a section 4(f) resource. While not adopting the National Trust's suggestion to rely on the Advisory Council on Historic Preservation's regulation, the Administration has revised the language in § 771.135(p)(4)(ii) to make it clear that: (1) Constructive use based on visual intrusion would occur only when there is substantial impairment to esthetic features or attributes of a resource, where such features or attributes are important contributing elements to the value of the resource; and (2) constructive use would occur when the location of the proposed transportation facility substantially detracts from the setting of a resource such as a park or historic site which derives its value in substantial part due to its setting.

Restriction of Access as Substantial Impairment

Proposed § 771.135(p)(4)(iii) noted that a restriction of access to a Section 4(f) resource may be a constructive use, such as when access by vehicles or pedestrians is "effectively eliminated." The Massachusetts Metropolitan District Commission commented that the example provided for restriction of access is too extreme, as did another commenter, and that in some instances, such as a waterfront park, access may constitute the primary value of the park. The National Trust made a similar comment and requested additional examples for this section discussing access to public historic sites and the possible negative impacts of increased access resulting from a project affecting sensitive archaeological resources.

The Administration believes that it has insufficient experience on the subject of "increased access" at this time to include such an example in the final rule. However, the National Trust's proposed deletion of the examples in the NPRM will be adopted for the same reason, i.e., insufficient experience, and to clarify that the Administration's intention is not to define "restriction on access" too narrowly. Section 771.135(p)(4)(iii) in the final rule

provides: "The project results in a restriction on access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site."

Vibration Impacts as Substantial Impairment

The National Trust commented that the example contained in § 771.135(p)(4)(iv) of the proposed rule was too extreme and "suggests that vibration impacts would not trigger Section 4(f) unless the vibration created an actual safety hazard or placed the building in danger of collapsing." The National Trust recommended revising the example to refer to affecting the "architectural integrity of a historic building or to substantially impair the public or private use and enjoyment of a historic site."

In response to the National Trust's comments, the Administration has further considered the issue of vibration from transportation projects and the conditions under which vibration impacts may constitute a constructive use.

First, a distinction should be made between vibration occurring during construction of a transportation facility and the vibration which may occur during operation of the facility. Pile driving, pavement breaking, and blasting are vibration-producing activities which warrant special consideration during construction. Advance planning and monitoring during actual construction will limit vibration to levels that will not normally cause structural or architectural damage to structures protected by section 4(f). In cases where heavy construction is carried out close to frail historic buildings, special measures must be taken, such as selecting appropriate equipment and placing limits on certain vibration-producing activities. The Administration believes that through planning, design and construction oversight, construction-related vibration can be adequately controlled and, because of the temporary nature of the activities, should not be construed as a constructive use of a Section 4(f) property. A new § 771.135(p)(5)(ix) has been added to the regulation to address vibration impacts during construction of a transportation project.

Vibration impacts during operation of a transportation project are a separate concern. Numerous studies of operational highway traffic vibration impacts have all shown that vibration levels from highway traffic have been well below criteria for architectural or structural damage to nearby buildings. Thus, it was not appropriate to retain the highway example used in the proposed rule.

Vibration from operations of rail transit projects can be a problem. Subways and surface rail lines serving dense urban areas may be located so close to buildings that architectural damage and annoyance to the buildings' occupants may result. There are a number of design and engineering measures that can be employed to reduce vibration from rail transit projects to acceptable levels. Nevertheless, rail transit is an appropriate example to use since damage or annoyance could result if special attention is not given to frail, old buildings with historical significance located very near the alignment. Section 771.135(p)(4)(iv) has been revised by using rail transit as an example and indicating that constructive use will occur when the predicted vibration levels from operation of the project are likely to cause structural damage or annoyance that would substantially impair the utility of the building. In these situations, guidelines published by the UMTA will be used to assess the magnitude of the impact and the need for, and effectiveness of, vibration control measures.

Other Examples

A comment was received from the United States Fish and Wildlife Service, New England Field Office, which requested that § 771.135(p)(4) be amended by adding a new section relating to "ecological intrusion" which substantially diminishes the value of wildlife habitat or interferes with long-established wildlife migratory paths or habits. A similar, more general comment was also received from the Office of Environmental Policy of the Department of the Interior. The Fish and Wildlife Service provided specific language for inclusion in the rule, covering a variety of such instances.

The Administration agrees with the suggestion made by the Fish and Wildlife Service. The Administration has expanded the examples provided in the rule by adding a new § 771.135(p)(4)(v), which provides: "The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes."

When a Constructive Use Would Not Occur

In proposed § 771.135(p)(5), the Administration set forth nine examples of when a constructive use would not be deemed to occur in the implementation of section 4(f). Where a situation is not clear-cut, the process set out in § 771.135(p)(6) should be used.

No comments were received from the respondents on §§ 771.135(p)(5) (i) and (viii). Accordingly, these sections have been adopted in the final rule as proposed.

Noise Abatement Criteria

The U.S. Department of the Interior and the Washington Department of Transportation disagreed with § 771.135(p)(5)(ii) of the proposed rule. Their concern focused on a substantial increase in projected noise levels due to the proposed action which do not exceed the FHWA noise abatement criteria. The Administration believes that, even if there is a substantial increase in projected noise levels, the various categories of noise-sensitive resources, and the threshold for consideration of noise abatement for each category, are appropriate for determining if there is a noise impact which could substantially impair a protected resource. Where there will be a substantial increase in projected noise levels due to the proposed action, but the levels do not exceed the FHWA noise abatement criteria or the UMTA guidelines for assessing noise impact, the Administration has determined that there will be no substantial impairment. Other than adding an additional clause to address the operational noise levels of transit projects which exceed the UMTA guidelines, the thrust of this section remains essentially the same.

Under § 771.135(p)(5)(iii), there is no constructive use if the projected noise increase is barely perceptible, even if the projected noise level is greater than the FHWA noise abatement criteria or the UMTA guidelines. Where the increase is greater than 3 dBA, and the FHWA noise abatement criteria or the UMTA guidelines are exceeded, there could be a constructive use as indicated by § 771.135(p)(4)(i).

No-Build Impacts as a Basis of Comparison

The National Trust was concerned about § 771.135(p)(5)(iii), no constructive use where there is a barely perceptible noise impact above projected no-build levels, and § 771.135(p)(5)(vii), no constructive use where proximity impacts are mitigated to an equivalent or better level than the no-build

scenario, because of its belief that current environmental documentation "tends to assume impacts for no-build alternatives that are seriously exaggerated, and are supported by little if any documentation." Accordingly, the National Trust suggested that these provisions be modified to provide for proximity impacts "demonstrated to occur" in the no-build scenario "as of the projected completion date for the project."

No-build projections in environmental documents submitted to the Administration are prepared by reasonably accepted methods and frequently represent a conservative estimate. Using a standard of "demonstrated to occur," as urged by the National Trust, implies a degree of certainty in predicting the future which may not be obtainable. In addition, projecting the no-build scenario impacts "as of the projected completion date" is of limited value. Projects are generally designed to last, and provide improved transportation benefits, for 20 years or more without substantial alteration. Thus, the appropriate comparison date is the minimal expected life of the project. Therefore, these sections have been adopted in the final rule as proposed.

Subsequent Development of the 4(f) Resource

Proposed § 771.135(p)(5)(iv) stated that a constructive use would not occur where the designation or development of the section 4(f) resource occurred subsequent to establishment of the transportation project's location.

The Maryland Department of Transportation supported the wording in this section and urged that it not be changed. While acknowledging the need to address the problem of transportation agencies being unfairly penalized by the later "creation" of public parks simply to block a project, the National Trust still suggested that the example was "too broad as currently drafted." The National Trust also noted that this example should not apply to historic sites, and it should only relate to section 4(f) resources designated after the Administration's "final" approval of an environmental impact statement. The Illinois Department of Conservation objected to this section by noting that Illinois applicants have adopted locations for transportation projects dating back to the 1960's. "In such a case it is entirely possible, with no intentional conflict of interest intended, that the designation, establishment or change in significance of a resource could occur." The U.S. Department of the Interior agreed that federally-approved right-of-way acquisition by a transportation agency was an appropriate restriction, but disagreed with the remaining location identification methods.

Other respondents to the proposed rule sought to expand the applicability of § 771.135(p)(5)(iv). The Transportation Corridor Agencies (TCA's) of Orange County, California, effectively noted the many problems faced by public agencies on land use planning with the subsequent or concurrent development of public parks in relationship to transportation improvements. The TCA's supported the intent of the proposed section, but asked that the rule be revised: (1) To provide that constructive use does not occur when the project is "designated" in planning documents before the section 4(f) resource is "established;" (2) to refer to designation of a "general alignment by any local or state agency;" and (3) to remove any implication that section 4(f) could apply to privately-owned parks designated in local planning documents. Similar comments were received from the Orange County Environmental Management Agency. Finally, a private land development corporation commented that language should be added to § 771.135(p)(5)(iv) which would provide that the "location" of the transportation project is deemed established for section 4(f) purposes "where a formal governmental action was taken to identify the general location" prior to the "designation" of the section 4(f) resource and with knowledge of the project's location identification.

The Administration declines to extensively broaden this example of when a constructive use would be determined not to occur. Formal governmental action beyond mere identification is necessary with respect to a project's location. Governmental actions, such as acquisition of right-of-way, adoption of a project location, or the Administration's approval of an environmental impact statement, are lengthy processes, with extensive studies, analysis, coordination and public involvement. Such processes act to provide "notice" to parties contemplating the subsequent development of a section 4(f) resource.

For these reasons, the Administration also does not accept the position of the Department of the Interior or the request of the National Trust to limit prior project designation to that contained only in a "final" environmental impact statement or other environmental document approved by the Administration. Such a limitation would not effectively address the problem, acknowledged by the National Trust, of unfair subsequent park designation designed solely to "stop" a transportation project after action has been taken to establish the location. As stated in the preamble to the NPRM: "When land is purchased and developed by an agency under such circumstances, the proposed transportation project should be anticipated by the purchasing agency [of the Section 4(f) resource] and the land should be developed to be compatible with the proposed transportation project * * * [I]t would be unreasonable to apply section 4(f) or to expect the Administration to shift its alignment * * * [creating a] potential for a never ending problem." 55 FR 3602 (1990). The Administration did add "final" before "environmental document" to clarify that the environmental process must be completed.

The Administration does accept, as urged by the TCA's, that governmental agencies other than an "applicant" for Federal-aid participation may acquire right-of-way for use in transportation corridors, and that a determination of Federal-aid participation may be made at a subsequent date. The Administration further recognizes the position of the National Trust that "subsequent development" problems are generally related to the creation of new public parks and recreation areas, and not normally related to historic sites. As noted in the preamble to the NPRM, in most cases, historic sites are not eligible for the National Register until they are at least 50 years old. However, it is the Administration's policy that if the age of the site is close to, but less than, 50 years, and construction would begin after the site was eligible, the Administration would treat the site as a historic site on or eligible for the National Register. The fact that a site is on or eligible for the National Register is important because it is presumed to be significant for purposes of section 4(f).

Thus, in response to these comments, § 771.135(p)(5)(iv) of the final rule provides: "There are proximity impacts to a section 4(f) resource, but a governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the Administration approval of a final environmental document established the location for a proposed transportation project before the designation, establishment, or change in the significance of the resource. However, if the age of an historic site is close to, but less than, 50 years at the time of the governmental agency's acquisition, adoption, or

approval, and except for its age would be eligible for the National Register, and construction would begin after the site was eligible, then the site is considered a historic site eligible for the National Register."

Concurrent Development of the 4(f) Resource

In proposed § 771.135(p)(5)(v), the Administration sought to address problems that occur when governmental agencies concurrently develop both a transportation project and a section 4(f) resource. This problem is particularly acute in the planning of transportation "corridors" in presently low population areas, designed to serve anticipated future growth and development. The Maryland Department of Transportation urged that the wording in this section remain the same in the final rule. Several commenters noted that "fear" of section 4(f)'s potential impact in this area actually serves to prevent the designation or donation of future parks and recreation areas for the public's benefit. The TCA's documented several instances of this problem. The Administration, and several commenters, believe that section 4(f) was not intended to have such an effect. Only the U.S. Department of the Interior commented that this section should be entirely deleted from the rule, stating that "these situations are best handled on a case-by-case basis."

The Massachusetts Metropolitan District Commission was also concerned with the following scenario: "It frequently happens that a park agency, struggling with a limited budget, owns land and has a long-range plan for its development. When a highway project is proposed, and there is no feasible and prudent alternative to the taking of some parkland, the development of adjacent parkland is proposed by the highway agency. The new regulation leaves open the possibility that the previously designated park land is exempted from constructive use impact—*because of the mitigation.*" The Administration agrees that where a park agency owns the property and has designated it for development as a section 4(f) resource, then a constructive use may result. However, where the resource's development is not reasonably foreseeable but for development with the transportation project, then consideration of both projects is best determined as "concurrent" development. Of course, a role for the park agency which owns or has jurisdiction over the property should be preserved in this process, and the final rule so provides.

While acknowledging the general benefits of this section of the proposed rule, the commenters also sought further "clarification" of concurrent planning to assist local agencies in their interpretation of section 4(f).

Although all possible instances of such concurrent planning, given the myriad of State and local government agencies involved, cannot be set forth in the rule, the Administration believes that further guidance is appropriate. The Administration also accepts the comment of the National Trust that this section is inapplicable to historic sites.

Accordingly, § 771.135(p)(5)(v) of the rule provides: "There are impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resources are concurrently planned or developed. Examples of such concurrent planning or development include, but are not limited to: (A) designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation project and the section 4(f) resource, or (B) Designation, donation, planning or development of property by two or more governmental agencies, with jurisdiction for the potential transportation project and the section 4(f) resource, in consultation with each other."

Overall Proximity Impacts to a Section 4(f) Resource

Section 771.135(p)(5)(vi) of the proposed rule was proposed in recognition of the fact that in certain limited circumstances, individual impacts of the transportation project may not substantially impair a resource, yet the combined effects of the impact may be of sufficient magnitude to cause a constructive use. A consultant was concerned that "secondary impacts arising from proximity" could result in neglect of a historic site due to a lessening of property value, or result in an increase in land value, an incentive to development which could lead to destruction of the historic resource. One commenter suggested that this section be deleted for fear that it "threatens to undo all of the progress made by the remainder of the proposed regulations defining constructive use."

This provision was never intended to greatly broaden the situations in which a constructive use could arise. It merely recognizes that an accumulation of impacts could, in specific instances, be so great as to cause a substantial impairment of the resource, even if each of the impacts taken alone might not. The Administration believes that there should be very few instances where this would occur.

In view of the limited number of situations to which this section could apply, the Administration has decided that the text of this section should remain unchanged.

Procedures for Determining Constructive Use

In proposed § 771.135(p)(6), the Administration set forth certain procedures with regard to the determination of a constructive use. The Oklahoma Department of Transportation, while generally supporting the proposed rule, believed that following the procedures under § 771.135(p)(6) would, in essence, require the preparation of a section 4(f) statement on every project where there may be constructive use. They recommended that this section be deleted and that such determinations be made by the Administration, State transportation officials, and other officials with jurisdiction over the resource on a "case-by-case basis." The National Trust commented that § 771.135(p)(6)(ii) should provide for the consideration of mitigation measures only when they are "binding and enforceable" and applied to all other alternatives considered in any analysis. The National Trust also commented that consultation with other Federal, State, and local officials having jurisdiction over the resource was insufficient; the National Trust would require "concurrence" from such officials on the identification and analysis. The Massachusetts Metropolitan District Commission offered comments similar to those of the National Trust. The U.S. Department of the Interior noted that it "fully supported" the consultation requirements of the rule, but asked that the Administration stress the plural nature of the word "officials," as many parties may have a proprietary or jurisdictional interest in certain protected lands. The Georgia Department of Transportation stated it would not be possible to comply with historic preservation requirements because the SHPO operates under section 106 procedures only.

The Administration believes that while the determination of whether a constructive use will exist should be made with the input of all officials with jurisdiction over the section 4(f) resource, the actual decision of the extent of the impacts remains with the Administration. Thus, a requirement of "concurrence" is inappropriate. It should be noted, when consultation with the SHPO results in an agreement of "no

effect" or "no adverse effect", under § 771.135(p)(5)(i) there would be no constructive use. If there is an "adverse effect" determination, the consultations with the SHPO would satisfy § 771.135(p)(6)(iii). Section 771.135(p)(6) is to be used on a case-by-case basis, when a legitimate question exists, to determine whether or not there is a constructive use. If there is no constructive use, the documentation of the analysis would not have to be detailed to the extent of a section 4(f) statement. There need only be enough information to support a determination that the project's impacts on a 4(f) resource do not rise to a level of constructive use. The Administration also believes that State and local officials who propose certain mitigation measures, and submit such measures for the consideration of the Administration and the general public, will reasonably and in good faith fulfill commitments made. The Administration already requires that proposed mitigation measures approved by the Administration be implemented. See 23 CFR 771.105 and 23 CFR part 630, subpart C, appendix A, paragraph 20. Thus, the Administration does not believe that it is necessary for this part of the rule to refer to "binding," "mandatory," or "enforceable" mitigation measures.

The Administration does agree, that when proposed mitigation measures are used in a constructive use determination, so that only the net impact need be considered in the analysis, reasonably equivalent mitigation measures should be proposed and considered for all other "build" alternatives. Frequently, an environmental impact statement or similar document will contain several transportation improvement alternatives and weigh the relative merits of each. All reasonable alternatives should be given equal consideration. If any of the proximity impacts will be mitigated, reasonably equivalent mitigation measures should be similarly analyzed for all feasible and prudent alternatives which are considered, and only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project. It is FHWA and UMTA policy that all feasible and prudent alternatives must be equally considered. However, this section does not deal with alternatives; rather, it focuses on the impacts, and mitigation of such impacts, on individual protected resources. The Administration determined that, except for substituting "project" for "action", § 771.135(p)(6)(ii) of the final rule should not be changed.

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The Administration has determined that this document does not contain a major rule under Executive Order 12291, although it is a significant regulation under the regulatory policies and procedures of the Department of Transportation because of the substantial public interest in environmental matters.

One commenter believed that "the proposed new regulations can very well have a significant economic impact on a substantial number of small entities, such as city and state park departments and should be further evaluated," but gave no reason for his belief. The Administration anticipates that the regulatory impact of this rule, if any, will be minimal since the amendments concern rules of practice and procedure. The revisions do not impose any new mandatory standards on State and local governments, but do provide recommended criteria for determining when a constructive use would or would not occur. The revisions merely formalize existing procedures and policies. Accordingly, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354), the Administration has evaluated the effects of this rule on small entities. Based on the evaluation, the Administration certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not have sufficient federalism implications to warrant preparation of a federalism assessment.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Numbers: 20.205, Highway Planning and Construction; 20.500, Urban Mass Transportation Capital Grants; 20.501, Urban Mass Transportation Capital Improvement Loans; 20.504, Urban Mass Transportation Technology; 20.505, Urban Mass Transportation Technical Studies Grants; 20.506, Urban Mass Transportation Demonstration Grants; 20.507, Urban Mass Transportation Capital and Operating Assistance Formula Grants; 20.509, Public Transportation for Rural and Small Urban Areas; 20.510, Urban Mass Transportation Planning Methods, Research and Development; 23.003, Appalachian Development Highway Systems; 23.006, Appalachian Local Access Roads. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

This rule does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have a significant effect on the quality of the environment.

Regulatory Identification Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 771

Environmental impact statements, Grant programs—transportation, Highway location and design, Highways and roads, Historic preservation, Mass transportation, Parks, Public hearings, Public lands—multiple use, Recreation areas, Reporting and recordkeeping requirements, Wildlife refuge.

Issued on: March 22, 1991.

T.D. Larson,

Administrator, Federal Highway Administration.

Brian W. Clymer,

Administrator, Urban Mass Transportation Administration.

In consideration of the foregoing, part 771 of chapter I of title 23, Code of Federal Regulations, is amended as set forth below.

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

1. The authority citation for part 771 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109, 128, 138 and 315; 49 U.S.C. 303(c), 1602(d), 1604 (h) and (i), and 1610; 40 CFR 1500 *et seq.*; 49 CFR 1.48(b) and 1.51.

2. Section 771.135 is amended by adding a new paragraph (p) to read as follows:

§ 771.135 Section 4(f) (49 U.S.C. 303).

* * * * *

(p) *Use.* (1) Except as set forth in paragraphs (f), (g)(2), and (h) of this section, "use" (in paragraph (a)(1) of this section) occurs:

(i) When land is permanently incorporated into a transportation facility;

(ii) When there is a temporary occupancy of land that is adverse in terms of the statute's preservationist purposes as determined by the criteria in paragraph (p)(7) of this section; or

(iii) When there is a constructive use of land.

(2) Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.

(3) The Administration is not required to determine that there is no constructive use. However, such a determination could be made at the discretion of the Administration.

(4) The Administration has reviewed the following situations and determined that a constructive use occurs when:

(i) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a resource protected by section 4(f), such as hearing the performances at an outdoor amphitheater, sleeping in the sleeping area of a campground, enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance, or enjoyment of an urban park where serenity and quiet are significant attributes;

(ii) The proximity of the proposed project substantially impairs esthetic features or attributes of a resource protected by section 4(f), where such features or attributes are considered important contributing elements to the value of the resource. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a park or historic site which derives its value in substantial part due to its setting;

(iii) The project results in a restriction on access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site;

(iv) The vibration impact from operation of the project substantially impairs the use of a section 4(f) resource, such as projected vibration levels from a rail transit project that are great enough to affect the structural integrity of a historic building or substantially diminish the utility of the building; or

(v) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes.

(5) The Administration has reviewed the following situations and determined that a constructive use does *not* occur when:

(i) Compliance with the requirements of section 106 of the National Historic Preservation Act and 36 CFR part 800 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register of Historic Places, results in an agreement of "no effect" or "no adverse effect";

(ii) The projected traffic noise levels of the proposed highway project do not exceed the FHWA noise abatement criteria as contained in Table 1, 23 CFR part 772, or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria in the UMTA guidelines;

(iii) The projected noise levels exceed the relevant threshold in paragraph (p)(5)(ii) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);

(iv) There are proximity impacts to a section 4(f) resource, but a governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the Administration approval of a final environmental document, established the location for a proposed transportation project before the designation, establishment, or change in the significance of the resource. However, if the age of an historic site is close to, but less than, 50 years at the time of the governmental agency's acquisition, adoption, or approval, and except for its age would be eligible for the National Register, and construction would begin after the site was eligible, then the site is considered a historic site eligible for the National Register;

(v) There are impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resource are concurrently planned or developed. Examples of such concurrent planning or development include, but are not limited to:

(A) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation project and the section 4(f) resource, or

(B) Designation, donation, planning or development of property by two or more governmental agencies, with jurisdiction for the potential transportation project and the section 4(f) resource, in consultation with each other;

(vi) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a resource for protection under section 4(f);

(vii) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur under a no-build scenario;

(viii) Change in accessibility will not substantially diminish the utilization of the section 4(f) resource; or

(ix) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of the section 4(f) resource.

(6) When a constructive use determination is made, it will be based, to the extent it reasonably can, upon the following:

(i) Identification of the current activities, features, or attributes of a resource qualified for protection under section 4(f) and which may be sensitive to proximity impacts;

(ii) An analysis of the proximity impacts of the proposed project on the section 4(f) resource. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts

which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project;

(iii) Consultation, on the above identification and analysis, with the Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or historic site.

(7) A temporary occupancy of land is so minimal that it does not constitute a use within the meaning of section 4(f) when the following conditions are satisfied:

(i) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;

(ii) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the section 4(f) resource are minimal;

(iii) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis;

(iv) The land being used must be fully restored, i.e., the resource must be returned to a condition which is at least as good as that which existed prior to the project; and

(v) There must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 777

[FHWA Docket No. 91-11]

RIN 2125-AC69

Mitigation of Impacts to Privately Owned Wetlands

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FHWA is amending its regulation on wetlands to make Federal funding available to a greater extent for mitigation of impacts to privately owned wetlands by revising the basis of FHWA financial participation. This action is in response to requests by States for more flexibility in funding wetland replacement activities and in response to the President's concerns on wetlands. This rule is expected to make FHWA funding policy more consistent with the needs of highway programs and Federal wetlands conservation policy, and to encourage wetland protection.

DATES: The effective date of this final rule is April 8, 1991. Written comments must be submitted by July 8, 1991.

ADDRESSES: Submit written, signed comments to FHWA Docket No. 91-11, Federal Highway Administration, room 4232, HCC-10, Office of Chief Counsel, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address between 8:30 a.m. and 3:30 p.m., e.t., Monday through Friday except legal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Des Jardins, Office of Environmental Policy, HEP-42, (202) 366-9173, or Ms. Virginia I. Cherwek, Office of the Chief Counsel, HCC-31, (202) 366-1372, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Background

Prior to this amendment, 23 CFR 777.11(f) limited Federal-aid participation in the cost of acquiring lands or interests in lands to the costs necessary to acquire one acre of replacement land for each acre of privately owned wetlands directly affected by a Federal-aid highway project. Any additional wetland acreage acquired by the States to mitigate impacts of the project had to be funded from State-only sources. Under this policy, many States have coordinated extensively with Federal, State, and local agencies in developing Federal-aid highway projects, particularly during the section 404 (33 U.S.C. 1344) permitting process, to generate wetland mitigation plans, only to find that FHWA could not provide full Federal-aid funding for the plans, even though these activities were necessary to advance the projects.

The FHWA is issuing a final rule amending this regulation because many States have expressed the need for greater FHWA financial support for their wetland protection and mitigation activities than this limitation allowed. In addition, there have been many instances in which FHWA's commitment to the protection and mitigation of wetlands has been questioned because of the limitation.

This amendment will provide fuller FHWA financial support for replacement of privately owned wetlands which are directly affected by Federal-aid highway projects, subject to the normal rules of Federal-aid participation. It will also promote the policy of the FHWA to mitigate the impacts of transportation projects and to enhance the environment, as described in the Environmental Policy Statement issued by the FHWA on April 20, 1990. (FHWA publication No. FHWA-RE-90-005 is available from FHWA's Office of Public Affairs, 400 Seventh Street, SW., Washington, DC 20590.)

The revised language for 777.11(f) calls for tests of "reasonableness" of cost and "equivalency" of wetlands functions. Federal-aid funds may participate in the reasonable cost of replacement of the wetland functions which are lost. The FHWA will base participation decisions on professional judgment as to the appropriate extent of replacement, using the best available and appropriate scientific tools for wetlands evaluation and impact assessment. The value of the impacted wetlands and the anticipated project impacts are the key factors in determining the level of mitigation effort required to compensate losses. The FHWA will provide Federal-aid funding to the extent reasonable for mitigation. There may be situations in which replacement of a wetland function will require acquisition of wetland acreage that exceeds the amount directly taken by the project. Other situations may warrant fewer acres. The important point is that FHWA participation will be based upon professional judgment and scientific determinations as to the appropriate level of mitigation, not upon arbitrary thresholds.

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 and is not a significant regulation under the policies and procedures of the Department of Transportation relating to regulations.

Although the Federal-aid highway program is a grant program, FHWA generally provides an opportunity for comment when promulgating a rule if the opportunity for comment is likely to result in useful information, if the rule is significant pursuant to Department of Transportation policy or likely to be controversial, or if otherwise in the public interest. In this case, the FHWA believes that circumstances warrant the issuance of this rule immediately without notice and an opportunity for prior public comment.

This amendment would modify part 777 so as to conform more closely to the needs of the States' programs and the current FHWA policy and practice of mitigating impacts to publicly owned wetlands. This amendment requires little, if any, administrative interpretation or discretion. The FHWA believes that it will not be controversial. Many State highway agencies (SHA's) have requested or agreed with the change, and are not expected to object to Federal funding being made available to a greater extent. In fact, the American Association of State Highway and Transportation Officials has passed a resolution in favor of more flexibility in this area. The FHWA believes that State

and Federal agencies with natural resources responsibilities also favor the change.

For these reasons, the FHWA anticipates that there will be no comment on the substantive issue of the rule, and a request for prior public comments would only delay the benefit of this amendment. Accordingly, the provisions that are contained in this publication are effective as provided by the section entitled DATES. Although the rulemaking section of the Administrative Procedure Act (5 U.S.C. 553) does not apply to grant programs, the above discussion would justify a finding for good cause under 5 U.S.C. 553(b) for not providing notice or seeking public comment before publishing the final rule. The FHWA, however, is providing the opportunity to comment after the effective date, and will publish a notice in the **Federal Register** explaining the disposition of any substantive comments that are received.

Further, there is no need to delay the effective date of the amendment for 30 days because no action is required by grantees of the Federal-aid highway program to comply; and, therefore, no lead time is necessary. Moreover, even under 5 U.S.C. 553(d), delay would not be required because the amendment merely lifts a restriction.

It is anticipated that the economic impact of this rule, if any, will be minimal since the amendment concerns rules of practice and procedures of a grant-in-aid program. It does not require the States to replace wetlands, but if they do, it provides for greater expenditure of Federal funds in place of State funds for replacement which would otherwise be done in response to State requirements and/or the section 404 program. Thus, there will be minimal, or no impact on highway financial resources as a whole. Although it is not possible to estimate the amount of funding which is expended on wetlands replacement because these costs are integrated into other project development costs, the amount of funding is relatively small, and FHWA does not anticipate that a significant increase will occur due to this amendment. It merely makes the FHWA procedures and policies more consistent with State practice and Federal policy. Accordingly, further regulatory evaluation is not required.

Regulatory Flexibility Act

For the foregoing reasons and under the criteria of the Regulatory Flexibility Act (Pub. L. 96-354), the FHWA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (44 U.S.C. 3504(h)), the FHWA finds that no additional burdens (reporting or recordkeeping) are being placed on the States or local agencies.

National Environmental Policy Act

This amendment does not require the taking or replacement of wetlands, but changes the relative amounts paid for replacement of wetlands by the State and Federal governments. It is not a major action having a significant effect on the environment, and therefore does not require the preparation of an environmental impact statement pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Regulation Identifier Number

A regulation identifier number [RIN] is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number for this section can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 777

Flood plains, Grant programs—transportation, Highways and roads, Wetlands.

In consideration of the foregoing, chapter I of title 23, Code of Federal Regulations, is amended as set forth below.

PART 777—MITIGATION OF IMPACTS TO PRIVATELY OWNED WETLANDS

1. The authority citation for part 777 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109(h), 138, and 315; E.O. 11990; DOT Order 5660.1A; 49 CFR 1.48(b).

2. Section 777.11 is amended by revising paragraph (f) to read as follows:

§ 777.11 Other considerations.

* * * * *

(f) The reasonable cost of acquiring lands, or interests therein, to provide replacement lands with equivalent wetlands functions for privately owned wetlands that are directly affected by a Federal-aid highway project is eligible for Federal participation.

* * * * *

Issued on: April 1, 1991.

T. D. Larson,

Administrator.

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